CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

TERRITORY OF ORLEANS.

SPRING TERM—1812—SECOND DISTRICT.

LIVAUDAIS vs. *HENRY.*

SPRING 1812. II. District.

If *pendente lite* a stay be ordered, and suit proceed, no new-trial shall be granted.

A NEW trial was moved for, on the ground that the defendant, sometime before the trial, had obtained a stay of proceedings, and made a cession of his goods to his creditors. The motion was overruled, as the defendant had gone to trial, and had taken his chance of obtaining a verdict, and as it did not appear that the proceedings, against the creditors, had been continued.

CURACEL vs. *COULON.*

A petition shall not be amended, by substituting another name.

Sumner, for the plaintiff, moved for leave to amend the petition, by striking out the name of *Curacel*, and inserting that of *Ganeson*.

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II. District.

CURACEL
vs.
COULON.

*By the Court.** This cannot be done. It would not be amending, but making a new petition, and consequently making a new suit. If that could be allowed, the names of both parties could be changed, consequently an entire new suit substituted. In this way, a party, whose right of action was lost by prescription, could, by engrafting his action upon another, brought some time before, deprive the defendant of his right, if he could find any suit standing against him, and obtain the plaintiff's leave to substitute his own name by an amendment; and afterwards, by another, change the nature of the action.

IT is true, parties are often added by leave of the Court—but this is very different from substituting a new plaintiff, in the room of the original one.

MOTION DENIED.

MOLLERE vs. *BAYON.*

A suit cannot be dismissed in the vacation.

If appeal be abandoned, execution shall not issue from the Court above.

THE plaintiff had judgment below, and the defendant appealed, signing himself the petition for the appeal. The papers were brought up, but, in the vacation, the defendant's attorney below ordered the clerk to enter a dismission of the appeal, which was done.

* MARTIN, *J.* sat alone during this term.

THE defendant, read an affidavit, stating that he had employed no attorney to prosecute the appeal—moved that the Court should order the clerk to rescind the entry, and that the cause might be reinstated.

Hopkins, for the plaintiff, opposed the reinstatement of the suit, on the ground that two terms had intervened since the dismission.

By the Court. A suit cannot be dismissed without the leave of the Court. In term time, a dismission, on payment of the costs, is generally entered, while the Court is open, as a matter of course, without any formal leave being asked: leave being presumed. But, however irregular the dismission may have been, the suit is now discontinued—the parties, two terms having intervened, are out of Court—the cause cannot be reinstated.

MOTION DENIED.

I. Baldwin, for the defendant, shewing that since the dismission, execution had issued from this Court, prayed a *supersedeas*.

By the Court. It must issue. The Parish Court is ousted of all jurisdiction in the case, after the filing of the petition and the execution of the bond. The act of 1807, ch. 1, s. 19, directs that "whenever any petition for an appeal shall

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MOLLERE vs. BAYON.

"be filed, and a bond executed and given, all "proceedings in such suit, in the Parish Court, "shall cease." The appellee is to take his remedy upon the bond.

WRIT ORDERED.

HUBBARD & HOPKINS vs. *BALDWIN & BLANCHARD.*

Whether the sheriff's commission be due, on an order of seizure, without a sale.

THE plaintiffs, having sued out an order of seizure, under which the property of the defendants was taken, they filed an answer, and an order was obtained for the suspension of the sale: the cause was tried, and judgment being given for the plaintiffs, the defendants paid the amount of it, before any writ issued for the sale of the property seized.

Hopkins, on the behalf of the sheriff. Before the property should be restored, the defendants should pay his poundage, under the act of 1805, ch. 49, which provides that the sheriff shall be entitled to receive the compensation specified in the act of the same year, ch. 36, s. 3, for the levying monies by writ of *fieri facias*, in all cases where the money shall not be paid within seventy-two hours from the time the said writ of execution shall have been served. A writ of seizure is as completely a *fieri facias*, or writ of execution, as that which issues after judgment in Court.

I. Baldwin, for the defendants. A writ of seizure is the original process, in a suit for the recovery of money, secured by mortgage. If the parties disagree on their respective rights, this mode of instituting a suit is the only proper one. More than seventy-two hours must elapse in every case, before the controversy be determined, and according to the proposition advanced, the defendant must ever be mulcted. If he succeeds, surely he must get rid of the poundage; the rule must be the same if, during the pendency of the suit, and even afterwards, the matter be settled in any manner that renders a sale unnecessary.

By the Court. Whatever may be the compensation due to the sheriff, when a writ of seizure is proceeded upon until the property is actually sold, he has no right of poundage till then. Surely he must be remunerated, for his pains and responsibility in seizing and keeping the property. The act of 1805, ch. 36, did not allow any poundage to the sheriff, on a writ of *fieri facias* which was not followed by a sale: and the act of the same year, chap. 49, which allows poundage when the money is not paid within seventy-two hours after the writ is served, must be construed strictly, and confined to writs of *fieri facias*, and not extended to similar writs. Most writs of seizure issue against landed property, the seizing and

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keeping of which require, in general, but little care.

The writ of seizure, when it does not occasion a sale, has a greater resemblance to the writ of attachment—it requires no greater trouble or care, and is not attended with more responsibility. The act of 180[illegible] ch. 36, provides that the sheriff's account, for keeping property seized and held under attachment, shall be settled and allowed by the Court, in case of dispute. The rule ought to be the same in this case.

*** The sheriff appearing dissatisfied, and it being suggested that the practice had been otherwise, no judgment was given, and the case was reserved for the opinion of all the judges.

BAYON vs. *RIVET.*

If a jury be prayed below the fact shall not be tried by the Court, above.

The defendant, in the Court below, had prayed for a jury, judgment was had against him, and he appealed: the plaintiff filed the common answer to the petition for the appeal, "that there is no error," &c. and now the defendant insisted on the cause being tried by a jury.

Gilbert, for the plaintiff. No jury was prayed for in this Court. The cause is to be tried *de*

novo: a jury, therefore, ought to be asked, or the trial will be by the Court.

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BAYON *vs.* RIVET.

Hopkins, for the defendant. The act of 1807, ch. 1, s. 20, directs that, on the appellee answering the petition for the appeal, by a declaration in writing that there is not any error in the proceedings below, the Superior Court shall proceed to hear the cause, on the pleadings transmitted from the Parish Court. The answer below is, then, emphatically the answer above. In this case it prays for a trial by jury: it was useless to repeat the prayer in the petition for the appeal.

By the Court. We would always lean in favor of an application, for a trial of a matter of fact by a jury. In this case, the applicant has been guilty of no latches.

MOTION ALLOWED.

SPENCER'S CASE.

Insolvent's commissioners' return, is to be *under seal.*

BEING imprisoned for debt, he had applied for relief, under the act of 1808, ch. 16, and the Court under the 6th section of that act, had appointed commissioners to investigate his affairs. They made their report, which was, on the motion of *Baldwin*, on behalf of the creditors, rejected, because it was not *under seal*, as the act requires.

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Suit abated, it appearing by the pleading that 850 only were due.

PLEA in abatement. The suit was brought to recover 125 dollars, lent by the plaintiff to the defendant, who pleaded that the sum demanded was not due, and that the plaintiff had claimed that sum, with a view to give jurisdiction to the Court.

THE plaintiff filed an interrogatory, to which the defendant answered, he had received from the plaintiff, the sum of 50 dollars, and no more.

Gilbert, for the plaintiff. Judgment must be given for the sum, which appears due from the defendant's own shewing. The Court may, perhaps, order the plaintiff to pay costs. There are frequent instances of judgment being given in this Court for less than one hundred dollars.

Baldwin, for the defendant. If the conclusion of the plaintiff's counsel be correct, a suit may be commenced, in this Court, for one dollar, and a rich man, willing to pay costs, may harrass his poor neighbour, by bringing him from a distant parish. The Court will not suffer the plaintiff thus to evade the law.

By the Court. This question was settled, a few days ago, in the fifth district, in the case of *Lefevre* vs. *Broussard*, *ante* 135. The plea is a good one, and must prevail.

JUDGMENT FOR DEFENDANT.

RAOUL vs. *DANBOIS.*

Defendant's affidavit, of *a good & equitable defence*, will not set aside a judgment by default.

I. Baldwin, moved to set aside a judgment by default, on an affidavit of the defendant, that he had a good and equitable defence.

Hopkins, for the plaintiff. The affidavit is insufficient, the cause ought to be set forth. The Court always require it, on a motion for a new trial. 1 *Martin*, 146. *André* vs. *Bienvenu.*

By the Court. The case of a new trial is not perfectly analogous, because the presumption which arises from the verdict or judgment of the Court, is much stronger than that which results from the delay or neglect of the party: but, by the act of 1805, ch. 46, sect. 4, a judgment by default is to be set aside, on *shewing*, not on *alledging* good cause.

MOTION DENIED.

ORILLON vs. *ROMAIN.*

Whether an appeal, without a bond, is to be sustained?

APPEAL. No bond having been filed:

Hopkins, for the appellee. The appeal ought to be dismissed, In the case of *Wall* vs. *Pousset's executors*, Judge Mathews held that there could be no appeal, unless a bond was filed. The

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act of the legislature has made no provision for any appeal, from the Parish Court, without bond.

Baldwin, for the appellant. No law requires that the appellant should give bond. Every citizen has a right to the opinion of the Superior Court: but, as a strong presumption arises, from the judgment of the Parish Court, that the party cast is liable, security is required of him, in order to suspend the execution, that, while the cause is depending in the Superior Court, he will not waste his property—that the time necessarily employed in ascertaining his rights, will not be improved in rendering those of the successful party inefficacious.

THE act of 1807, ch. 1, provides that *no appeal shall stay execution*, unless the appellant shall, before execution, give bond, with one sufficient security, for prosecuting the appeal with effect. This impliedly admits that other appeals, that is, such in which no bond is given, *shall not* stay execution. *Exceptio probat regulam.* It would have been vain to have thus made this implied exception, if it had not been understood that such appeals, which did not stay executions, could exist.

IN the next paragraph, the legislature directs that "whensoever such petition, for an appeal, "shall be filed, *and such bond executed and given*,

"all proceedings in such suit, in the Parish "Court, shall cease"—clearly implying, that whensoever such a petition shall be filed, *and* NO *such bond executed*, the proceedings in such suits, in the Parish Court, *shall* NOT *cease*, notwithstanding the appeal; but the successful party shall proceed to execution.

By the Court. The implication is sufficiently strong, to warrant the conclusion drawn by the appellant's counsel. The appeal will be sustained, and the cause continued, as one of the judges has entertained a different opinion, and the Court is now composed of one judge only, in order that the opinion of the third judge may be had.

APPEAL SUSTAINED.

BERTUS vs. HARBOUR.

I. Baldwin, shortly after filing his answer, moved for leave to amend it, by adding a prayer for a jury.

Petition unamended, by praying for a jury.

Hopkins, contra. The Court will not grant it, unless they be convinced of the necessity of the amendment, and that the only object of it, is not to delay the trial.

By the Court. We will always be induced to gratify a party, who wishes to draw the trial of a

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matter of fact, from the Court, to its constitutional triers, provided the party applying does not come too late. The present defendant had the whole of this day to file his answer.

LEAVE GRANTED.

WATKINS vs. *McDONOUGH.*

Parol evidence, of warranty in the sale of a slave, inadmissible.

SUIT on a warranty for the soundness of a negro sold by the defendant. The answer denied all the allegations in the petition.

Hopkins, for the plaintiff, offered a witness to prove the sale.

Morse, for the defendant. The evidence is inadmissible. The *Civil Code* provides that every covenant, tending to dispose, by a gratuitous or incumbered title *(un titre gratuit ou onéreux)* of any immoveable property or slaves in this territory, must be *reduced to writing*, and in case the existence of such a covenant should be denied, no *parol evidence* shall be admitted to prove it. *Art.* 241, *p.* 310.

WITNESS REJECTED.

Whether one may be interrogated, as to the genuineness of his signature?

GRAY & AL. vs. *GENTRY.*

SUIT on a promissory note, with a subscribing witness. The petition contained an interrogato-

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ry, by which the defendant was required to say, whether the signature, at the foot of the note, was not in his hand-writing.

Hopkins, for the defendant. The interrogatory is inadmissible. This mode of probing the defendant's conscience, can only be resorted to, where a fact cannot otherwise be proven.

IN *Read* vs. *Bailey*, it was said by LEWIS, *J.* that the reason of the law, in permitting a party to resort to the conscience of his adversary, for a disclosure of facts, is founded in necessity, and is intended to apply only in cases where the evidence sought for, is wholly in the power of the party, called upon to disclose. *Ante* 76.

IN *Randle's adrs.* vs. *Judice*, and *Hart & al.* vs. *Bourgeois*—the Court, LEWIS, *J.* alone, ruled that the defendants could not be called upon to answer interrogatories, concerning the genuineness of the notes.

THE party, *who acknowledges he has no proof, or an insufficient one*, may require the oath of his opponent. 1 *Domat*, 5, *t.* 6, *sect.* 4.

As it often happens that he, who has to prove a contested fact, has *neither writing, nor witnesses*, nor sufficient presumptions, the confession of it is obtained from the mouth of his adversary. *Id. sect.* 5.

THE third manner of obtaining a party's con-

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fession, is, *where he who cannot have the proof of a fact*, which he alledges, refers himself to the oath of his adversary. *Id.*

OUR statute points out the mode in which a contested signature to a note, is to be proven. In case the party disavows his signature, proof of it may be given by at least one credible witness, declaring positively that he knows the signature as having seen the obligation signed; or the signature must be ascertained by two persons having skill to judge of hand writing, after having compared it with papers, acknowledged to have been signed by the party. *Civil Code*, 306, *art.* 226.

IN this case, it clearly appears that the plaintiffs have proofs within their power—they cannot, therefore, call on the defendants to supply them with evidence. On general principles, therefore, the interrogatory is improper. Farther, the law has made a special provision for this case. It appears there is a subscribing witness, he, therefore, must be brought forth—if there were none, a report of experts, or the answer of the defendant, might be the proper criterion.

Baldwin, contra. Our statute has expressly provided that, "when any plaintiff *shall wish* to "obtain a discovery, from the defendant on oath, "such plaintiff may insert, in his petition, perti-"nent interrogatories." 1805, *ch.* 26, *s.* 7.

IT is not necessary that the plaintiff should *need*, it suffices that he *wishes* such a discovery.

THE statute has but one exception—provided that the interrogatory does not charge the defendant with any crime or offence.

THE *Civil Code*, 316, contains nearly the same provisions. It provides for the case, in which the judge may wholly, or in part, dispense with the answer of the party interrogated, viz. when the interrogatory is impertinent, and has no reference to the issue. *Id. art.* 262. In all other cases, it seems the party must answer.

AS the law often gives concurrent remedies, there is no incongruity in allowing concurrent means of proof.

By the Court. A party, with an ill grace, complains that his adversary constitutes him a judge in the cause: and a case can hardly be imagined, in which a defendant may suffer by being compelled to acknowledge, disown, or declare that he does not recognise, a paper, apparently subscribed by him.

OUR statute having expressed the cases, in which a party may require his adversary to swear, the Court cannot admit the exception contended for, on the supposition that it exists in France. *Domat* cites no authority, and does not positively re-

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cognise, though the language he uses impliedly admits, it.

IT would not be admitted in any of the courts of equity in the United States, and it is clear the Roman law precluded it: *Ait Prætor: eum a quo jurisjurandum petetur, solvere aut jurare cogam: Alterum itaque eligat reus: aut solvat aut juret: si non jurat, solvere cogendus erit a prætore. ff. lib.* 12, *tit.* 2, *l.* 34, *s.* 6.

HOWEVER, as it is advanced by a gentleman of the bar, that, in two cases, the objection prevailed, and this is not contradicted, the case must stand over for further argument, and the opinion of a full bench.

CUR. ADV. VULT.

SCOTT vs. *BILLINGS.*

Whether one may be interrogated, on the genuineness of his signature?

PROMISSORY *note, without a subscribing witness.* The petition contained an interrogatory, as in the preceding case. The same objection was made, and the question in like manner reserved.

Baldwin, for plaintiff. *Hopkins*, for defendant.

APPENDIX

CONTAINING

CASES

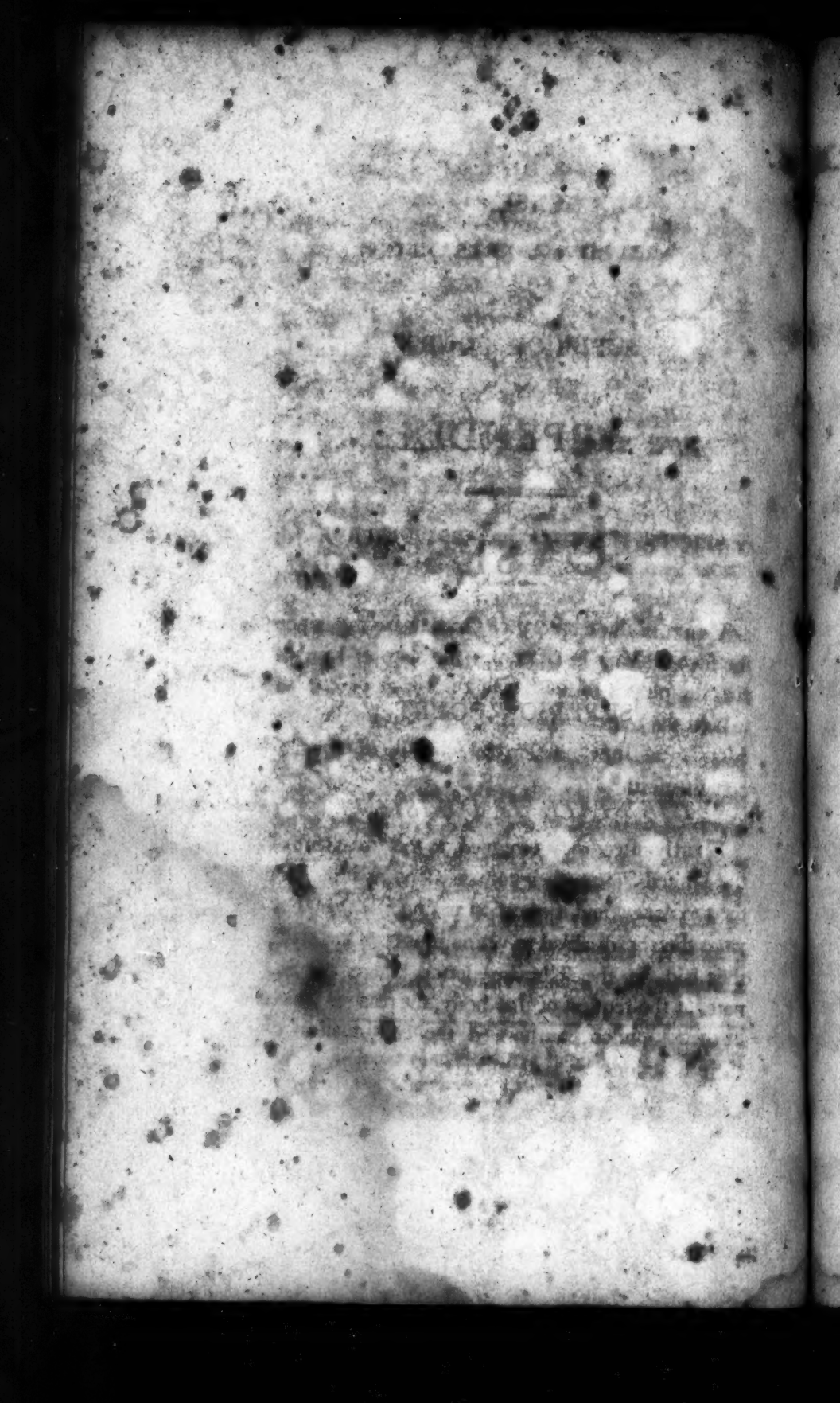
ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF

THE STATE OF LOUISIANA.



CASES

ARGUED AND DETERMINED.

IN THE

SUPERIOR COURT

OF

THE STATE OF LOUISIANA.

SPRING TERM—1812—FIRST DISTRICT.

Spring 1812. I. District.

PART of the territory of Orleans having, since the first of May last, become the state of Louisiana, the judges of the former territory proceeded to hold the Superior Court of the state, on the first Monday of June, under the schedule of the state constitution.

Shortly after, they resigned, to the President of the United States, their commissions as judges of the territory; and a question arising whether they were thereby disabled to act as judges of the state, they laid, in the following letter, before the Senate, at the request of that body, the reasons which in their opinion, authorised the continuance of their functions, as state officers.

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New-Orleans, August 14th, 1812.

GENTLEMEN,

We find by a resolution of the Senate, which you have done us the honor of enclosing to us, that you have been appointed, as a committee, "to wait on the judges of the Supe-"rior Court, and request them to state, in writing, "at what period they resigned their commissions; "and whether they consider themselves authoris-"ed, under the schedule of the constitution of the "state, to continue in the discharge of their du-"ties."

In compliance with this request, we apprise you, for the information of the Senate, that on the 7th of last month, two of the judges (*Lewis* and *Martin*) wrote a letter, a copy of which is inclosed, to the secretary of state for the United States,* and that a few days after, the other judge (*Mathews*) wrote a similar one to the same officer, a copy of which he has not preserved.

Further, that since the creation of the state, we have considered, and still do consider ourselves, authorised, under the schedule of the constitution, to continue in the discharge of our duties

* The letter contained a resignation of the offices of judges of the territory of Orleans.

as judges of the Superior Court of the state, "until "superceded under the authority of the constitu- "tion." SPRING 1812. I. District.

At the dates of our letters to the secretary of state of the United States, the government of the union entertained an opinion, to which we were not able to give our assent. It appeared by a letter from the head of the department of the treasury, that the erection of the state of Louisiana, had worked a dissolution of the whole territory of Orleans, in the judgment of that officer: and that, consequently, the commissions of the territorial officers were no longer the evidence of existing authority and power, and a title to compensation, but mere memorials of the confidence of the government. It did not appear very extraordinary that an opinion, which we believed to have been formed in the hurry and bustle of official affairs, should vary from that which we had formed in the silence of the closet. An attentive perusal of an act of congress, convinced us, however, that the opinion of the legislature of the union, seemed to concur with that of the treasury department. In erecting Louisiana into a state, the office of district judge for the district of Orleans, was considered as determined by the supposed dissolution of the territory of Orleans. Judge Hall ceased to exercise the duties of it, and a few weeks after was in-

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vested with a new office. In this opinion, we have always concurred, so far as it relates to that part of the territory, which became the state of Louisiana, on the 30th of April last.

ON the opening of the term of the Superior Court for the first district, early in May last, it appeared that the opinion entertained at Washington City, had some partizans among the gentlemen of the bar, and the judges thought it their duty to desire that, if any doubt was entertained of their authority, as judges of the Superior Court of the state, they might be favored with an argument on that subject.

AFTER a patient hearing of every thing that was offered in favor or against that authority of the Court, the two judges present (*Lewis* and *Martin*) determined that the territory of Orleans was *dismembered*, but not *dissolved*. That the tract of country between the Mississippi and Pearl river, and the 31st degree of N. latitude, and the Iberville and the lakes, was still the territory of Orleans. That the judges on the bench considered themselves invested (besides the office of judges of the territory of Orleans) with that of judges of the Superior Court of the state of Louisiana.

THE 3d section of the schedule having required the territorial officers to continue the exercise of

the duties of their respective departments, the judges considered themselves as appointed by an official description, as pointed as a personal one, to the offices, under the authority of the state, which they had exercised under the authority of the United States.

AN office consists in *power*, *duties*, *emoluments*, and *responsibility*.

1. The judges found themselves clothed with *power* under the authority of the state.

2. They had *duties* to perform for the state, and a late resolution of the senate, has sanctioned the opinion the judges had formed, that for the exercise of the powers, and the performance of these duties,

3. They were entitled to *emoluments* from the state.

4. And the judges could never entertain any doubt that they were *responsible* to the state. So, that if it had been the misfortune of any of them to deviate from the path of duty, he would have been liable to impeachment and prosecution in the courts of the state.

IT is true, they were without a *commission* from the state. The reason of this was, that the office was bestowed on them by the constitution: and that conventions and legislatures, and indeed

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all large bodies of men, do not usually commission officers appointed by them.

The present legislature of this state has already appointed a state treasurer and two state printers, without commissioning them. The entries on the minutes of the legislature, are the evidence of the appointment of these officers, as the 3d section of the schedule is the evidence of the appointment of the judges of the Superior Court.

The present judges having come to office, by being the persons invested with corresponding offices under the territorial government, it remained to be considered whether their continuance in, and the duration of, the office of territorial judges, was necessary to their continuance in the office of judges of the Superior Court of the state.

There is nothing in the schedule that induces us to answer that proposition in the affirmative.

The schedule uses the expressions, "the go. "vernor, secretary, and judges"—clearly relating to the governor, secretary, and judges, vested with offices at the change of government—not certainly, to any future officer sent, by the President of the United States, to govern the remaining part of the territory.

Wisdom is to be presumed in the Convention, and wisdom directs to means adequate to the end.

THE end was, "to prevent such inconvenien- SPRING 1812.
"cies, as might arise from the change of a territo- 1. District.
"rial to a permanent government."

NOW, when the constitution was drafted, it was foreseen that the part of the territory not represented in the convention, would be disposed of by being annexed to an adjacent territory, or to the new state, or erected into a separate government. In either of which cases, if the state offices expired with the territorial government, the powers of the governor, secretary, and judges would expire and be determined; and the provision would thereby prove incommensurate with the object; anarchy and confusion would be the inevitable result. Every consideration, therefore, must repel a construction so unnecessary and disastrous.

ADOPT this construction, and the mischief here referred to, has already happened. By the consent of the legislature, the remainder of the former territory of Orleans, out of the original limits of Louisiana, has been entirely disposed of, by its annexation to this state and the Mississippi territory—so that the offices of the territorial judges are completely determined, since there exists not a square foot of ground, over which the *authority*, given them by their commissions from the United States, can be exercised.

THIS power being gone, there remains no *duty* to be performed, and, consequently, no *compen-*

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sation or emolument to be claimed, and all *responsibility* is dissolved.

This office is, therefore, as much *extinct*, as if it had been *determined by the expiration of the time for which it was granted*, or by resignation duly accepted.

THE Court, therefore, considered the offices of its members, as vested in them by the constitution, as effectually as if the convention had directed its president nominally to commission the judges.

THEY believed that, if the balance of the territory had continued a distinct territory under the same name, any person appointed a judge after the erection of the state, could not have come over to exercise judicial duties: as the convention had only confided in the judges—not every judge of the territory of Orleans, that might afterwards arrive; but the judges in office at the change of government.

FURTHER, that on the death or resignation of any of the present judges, the state, and not the United States, was to give him a successor. The office of judge of the Superior Court of the state, being sufficiently settled and established, to admit of its being filled, as any other office in the event of a vacancy.

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THE Court proceeded to business without any further difficulty. Upon the rising of it, information was received from Bayou Sarah, that the inhabitants in that quarter felt but little disposition to recognise the authority of the judges. Gentlemen of the bar wrote to us, that apprehensions were entertained, that an attempt to hold Court, might excite tumult and riot. This information was confirmed by a memorial from a number of respectable inhabitants.

THE judges now found themselves compelled to determine whether they would proceed to St. Francisville, and exercise their judicial duties, in a part of the country, the inhabitants of which were disposed to question the authority of officers, whom the government of the United States appeared to disown.

THE general result of their reflections, aided by all the sources of information, and every advice within their reach, was, that their authority, as territorial judges, remained unimpaired in the seventh district of the former territory.

THIS was to be rule of their conduct, although contrary to the opinion which they were bound to weigh and respect, but to which they could not submit, without a dereliction of duty; the authority was to be exercised or surrendered: the latter alternative was adopted.

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In resigning, the judges understood they resigned no authority under the state—they resigned to the President of the United States; and, therefore, those powers only, the resignation of which he could accept, to wit, those he had given. They considered their authority, under the schedule, as unimpaired, and have continued in the daily exercise of it.

They believe that the state having acquired a right to their services, no resignation to which the state was not a party, could possibly dissolve the relation between them and their fellow-citizens of the state.

They now consider their power, under the state, such as it was under the territory—a power which ought to be exercised, until superceded under the authority of the constitution.

With sentiments of great respect,
We are, Gentlemen,
Your most obedient servants,

Geo: Mathews, Jun.
Joshua Lewis,
F. X. Martin.

Hon. David B. Morgan,
and Joseph Landry, Esq's.

M'FALL'S CASE.

SPRING 1812.
1. District.

Witness summoned in town, and staying till Court, not allowed milage back.

Detained in town, allowed pay from the date of his recognizance.

THIS man, an inhabitant of the state of Kentucky, came down on a trading voyage to New-Orleans, and was recognised as a witness to attend the trial of an indictment.

Morse, on his behalf, now claimed the daily allowance, made by the act of 1807, chap. 2, sect. 8, and milage to his place of residence in Kentucky.

THE daily allowance was claimed, from the date of the recognisance till the indictment was disposed of.

By the Court. Milage cannot be allowed, for witnesses are to be allowed only "for every mile "they shall necessarily ride going and coming"—now, if this man is under the necessity of *returning* home, it is not on account of the summons he has received, for he was not compelled to remove from the city of New-Orleans, in which he was summoned; so the necessity he is under, of returning to Kentucky, is not occasioned by the summons.

THE English part of the act, provides an allowance "for each day, they (witnesses) shall be "detained on the trial of any cause;" while in the French part, the allowance is, "for every day they "shall be detained near the Court"—*qu'ils seront*

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détenus près du tribunal. The first allows for every's days actual attendance on the trial, the second for every day's detention.

IN this case, the witness was recognised as he was returning home, and was compelled to wait till the meeting of the Court—the time being too short to allow him to go home and return. It is, therefore, but just the territory should pay him during the time he waited in town, for the meeting of the Court. Indeed, his case comes within the very letter of the French part of the act: he was detained near the Court—*détenu près du tribunal.*

HUDSON'S CASE.

Intention to depart, easily presumed, when a fraudulent or suspicious disposal of property is proven.

HE was arrested under the 22d sect. of the act of 1807, ch. 1, on the affidavit of the agent of one of his creditors.

Livingston and *Depeyster* moved that they might be allowed to disprove the intention "fraudulently and permanently to depart"—in order to obtain his release, without giving security.

WITNESSES were accordingly introduced, which testified to their belief that he meant to remain in the territory, till his affairs (particularly the present debt) were settled: a belief which arose

from their conversations with him, and the nature of certain transactions in which he had lately engaged.

Smith and *Duncan*, who had obtained the judge's order, insisted on the proof resulting from the affidavit on which it had issued; and on the proof which they made, that he had sold a quantity of goods to the amount of about 60,000 dollars, to a person, who had failed the year before, on a simple note, without any endorser or any kind of security. The goods being the ground of the present debt, for which judgment had been confessed, with a long stay of execution. It was farther proved that the debtor, some time before, in an attempt to obtain the benefit of an insolvent law, had sworn to a schedule of his property, from which a considerable part of his estate was suspected to be omitted.

Livingston and *Depeyster*. The affidavit goes only to the belief of the deponent—this kind of proof is only admissible, when the statute authorises it. The section, under which the judge's order issued, requires proof "to the satisfaction of "any judge of the Superior Court."

PERHAPS the affidavit would have entitled the creditor to a writ of sequestration, but surely not to the arrest of the debtor, before the debt became payable.

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HUDSON'S CASE.

By the Court. Proof is the offer of circumstances which create conviction. A debtor may conceal his intention, so as to deprive his creditor of the means of administering positive evidence of it. Circumstantial evidence must then be admitted.

PACKING off goods is admitted to be evidence of intended flight. Reducing all one's goods into cash, paper, or portable effects, will operate as strongly upon the mind.

IF the intention to defraud be proven, a magistrate will be satisfied with facility of the intention to depart.

IN the present case, the disposal of so large a quantity of goods, by far the greatest part, if not the whole, of the property in the defendant's possession, in such a manner that when the execution will be at its maturity, they will be removed from its effects—the sale too, to a man who failed the year before, who has no visible property, without any surety, is a circumstance so uncommon, as to excite great suspicion, and amount to positive evidence, if not plausibly accounted for. In every bailee, very gross negligence amounts to fraud.

THE impossibility of coming to any property of the debtor, certainly excuses the creditor, if he does not resort to this mode of relief.

THE evidence before the Court, does not disprove the alledged intention. The judge who

granted the order, was satisfied with the proof offered; and there is nothing in what is presented to us, to induce us to believe that the intention to depart does not exist.

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HUDSON'S CASE.

RELEASE DENIED.

BLOIS vs. *DENESSE.*

By the Court. If a debtor has time given him by his creditors, and afterwards denies the debt of one of them, he may bring a suit for a recognition of the debt, notwithstanding that the convention between the creditors and the debtor, allowing him a delay, has been homologated; for during the time given, the evidence of the debt may perish.

Creditor, whose debt is denied, may sue, notwithstanding the delay granted.

Caune, for the plaintiff.
Seghers, for the defendant.

DELOGNY vs. *RENTOUL.*

Ellery, opposed the introduction of testimony to prove admissions made, while a compromise was in contemplation.

Conversation of a party, while a compromise is in view, admitted to prove a fact.

Livingston, contra. Proposals made while a compromise is on the carpet, do not bind; but conversations, in which a fact is disclosed, may be admitted to prove it.

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OF this opinion was *the Court*.

CHABAUD vs. *GODWIN*.

Appellee must confine himself to the general answer, unless he have leave.

By the Court. The appellee, in answering the petition for the appeal, cannot insert any new matter, much less annex any document, and entitle himself to read it, without leave of the Court—but must confine himself to the general answer, to wit, that there is no error, &c.

Hennen, for the plaintiff.

Depeyster, for defendant.

RALPH & CO. vs. *F. L. CLAIBORNE*.

No appeal from an interlocutory judgment.

THE defendant prayed for a mandamus to the parish court.

HE is a citizen of the Mississippi territory, and being sued by a citizen of one of the United States, he filed his petition under the act of Congress, 1 *U. S. laws*, 56, for the removal of the cause for trial into the district court of the United States. The parish court rejected his application, whereupon he prayed an appeal, which was refused. His application was for the writ of this Court commanding the parish court to admit the appeal —on the ground that he could not proceed before the parish court, without waving, by his plea, the

right of removing the cause into the district court.

By the Court. The interlocutory judgment cannot be the ground of an appeal.

MANDAMUS DENIED.

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RALPH & Co. *vs.* CLAIBORNE.

STATE vs. *DUPUY.*

The French and English part of an act, construed together, not viewed as distinct acts.

By the Court. The defendant is indicted for *shooting at* a man, with intent to murder him: and we are applied to, to bail him.

BY the act of 1805, ch. 50, sect. 24, an assault by wilfully *shooting at*, with intent to commit murder, is made a high misdemeanor.

BY that of 1806, ch. 29, sect. 1, *shooting* any person, with intent to commit the crime of murder, is made a capital offence. In the French part, however, of this act, *shooting at*, is made capital; when done with a murderous intent—*qui tireront avec un arme à feu sur quelque personne.*

SINCE the year 1806, inclusively, the acts of the legislature are passed in both languages, and an original in each, receives the signatures of the speaker of the house of representatives, the president of the council, and the approbation of the governor. So that they are both the text: and the practice of the Court has been, to construe them, one by the other. Neither of them is a translation of the other.

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But we cannot consider the two acts otherwise than as parts of a whole, and not as distinct expressions of the will of the legislature—as *two* acts.

If we were, the French part of the act of 1806 would take the offence of *shooting at*, with the intention of committing murder, from the class of misdemeanors, and place it into that of capital offences.

Construing it, however, with the English part, the French is controlled by it, and the shooting remains in the class of misdemeanors, when the party aimed at is missed. We do not allow the French to control the English, because the mode of construction most favourable to the defendant must prevail.

Bail admitted.

POUTZ & AL. vs. DUPLANTIER.

A sale, on credit of the goods of the maker of a note, does not discharge the indorser.

The defendant was sued as endorser of a note. The plaintiffs had brought suit and obtained judgment against the maker, whose property was taken in execution and sold at twelve months credit, under the act of 1808, ch. 15.

Hennen, for the defendant. This is complete payment, the maker's property being taken from him and sold to discharge the judgment: the debt is completely satisfied. The seizure made by the

sheriff, has divested the maker of the note from his right on the land taken in execution. He stands completely discharged. Surely the plaintiffs could not take him on a *ca' sa'*. The law will not take the maker's property, and the endorser's cash, to discharge the note, if the property seized be sufficient. If the plaintiffs recover in the present suit, the present defendants will turn round, after having paid the judgment, and bring their action against the maker of the note, for money paid for him; and thus he will be twice charged. The seizure, or forced sale, of the goods and chattels of a debtor, transfers the property of the thing seized to the purchaser or vendee. *Civil Code*, 490, *art.* 1.

Morel, for the plaintiffs. The holder of a note cannot lose his claim on any of the parties whose name appears on the face or back of it, till he actually receives the amount of it. Even the capture, detention, and discharge from imprisonment of a co-obligee, does not discharge the others: nothing but actual payment will do it. *Hayling* vs. *Mulhall*, 2 *Bl. Rep.* 1235. A levy of sufficient property to satisfy the debt, will be of no avail to a co-obligee, unless an actual sale has taken place: till the money be paid.

By the Court. If the act of our legislature were susceptible of no other mode of construction,

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than that for which the defendant's counsel contends, we would be bound to declare it unconstitutional. The tenth section of the first article of the constitution of the United States, provides that no state shall make any thing but gold or silver coin, a tender in payment of debts. If the plaintiffs were compelled to discharge the defendant, they would have nothing for the debt but the note and surety given by the purchaser of the property, at the sale under the execution, and the lien or mortgage on that property. That property, if it consist in negroes or goods, may perish—even lands are, in this country, liable to deterioration and destruction by the Mississippi. The law would, then, make such a note, a chose in action, and the lien on the goods sold, a tender in payment of debts. This the constitution of the United States has forbidden.

THE execution, till the money be actually got, is an ineffectual execution, and that is no bar to the plaintiff's claim, against a co-obligee, according to the cases cited on the part of the plaintiffs.

THE jury, however, found a verdict in favor of the defendant.

BERMUDEZ vs. *BERMUDEZ.*

A wife, living out of her husband's house, not allowed to keep her daughter.

THE plaintiff had procured a writ of *habeas*

corpora against his wife, for his two sons and daughter.

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ABOUT eight or nine years ago, he was under the necessity of visiting the internal provinces of Spain near Louisiana, and was imprisoned on an alledged breach of their laws; and several years elapsed before he could return to New-Orleans, his place of residence. He had left the whole of his effects with his wife, for her support and that of their children, and had directed, besides, the payment of a monthly allowance to her; and during his captivity and absence, had taken measures for the disposal of a tract of land near the city, and the application of as much of the proceeds as would appear needful, to the wants of the family.

ON his return, the lady, who lived in her brother's house, declined returning, or sending the children, to her husband.

SHE brought the children into Court, in obedience to the writ, declared her readiness to submit to its order, but insisted on her right to retain her children, especially the girl, who appeared to be about eleven years, to whom, in her judgment, the cares and attentions of a mother were more necessary than those of a father.

THE Court asked her, why she had refused returning to her husband—she answered, she had reasons which she declined giving.

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She was farther asked, whether she had any grounds of complaint against him—whether she judged him to want the ability or disposition, to educate the children well—or whether she could alledge any instance of misconduct in him, which it might be improper that the children should witness? She answered all these questions in the negative.

By the Court. The paternal house is the proper residence of the family. If the wife chuses to absent herself from it, without offering to the Court any reason therefor, the Court will presume that none exist. *De non apparentibus et non existentibus, eadem est lex.* In such a case, they must consider her as the faulty parent.

The father is the master of the family. His authority, as to its civil force, is founded in nature, and the care which it is presumed he will have of their education. While his conduct is proper, the Court cannot interfere with his authority, and will cause it to be respected.

The mother, however, is not without her rights. If she be compelled to live separated from him, on account of ill treatment—if, from his conduct, she can shew that the children are not likely to receive a proper education, or that it will be a dangerous example to them, the Court will afford

their aid to her solicitude, especially in regard to the daughters, and deprive the father of a power which it is likely that he will abuse. For the irght of the community to superintend the education of its members, and disallow what, for its own security and wellfare, it sees good to disallow, goes beyond the right and authority of the father. *Blisset's case, Lofft's Reports*, 748-749.

THE Court orders that the plaintiff's sons and daughter be delivered to him.

DURNFORD vs. *JOHNSON.*

An ineffectual attempt to present the note to the maker, does not suffice to charge the indorser.

THIS was a suit against the indorser of a promissory note. The maker, at the time it was given, resided in New-Orleans, from whence the note bore date. Before it became due, he went to Europe, and on his return went to reside, with his wife's mother, in the county of the German Coast.

THE note, which was deposited in the bank for collection, was, on the last day of grace, handed to a notary, with a charge to be strict in making the protest. He accordingly went to the ferry, in order to cross the river—but was told the wind was too high to admit of his going over, whereupon he rode a considerable distance up the river without being able to cross, and was informe dit would

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be in vain to go higher, as no craft were to be had. This being late on Saturday, he declined proceeding farther: the next day he returned home, and on Monday morning made a protest in his office, and gave notice to the indorser.

THERE was not any evidence of any other call, or of any demand, on the maker.

ON this, *Hennen*, for the defendant, prayed for a non-suit, and the Court intimating an opinion that the plaintiff had not made out his case, and ought to be non-suited—*Depeyster* and *Porter*, for the plaintiff, declined to submit to a non-suit, *Hennen* objected to the note and protest going to the jury.

By the Court. The plaintiff having the right, notwithstanding the opinion of the Court, to put his case to the jury, it follows that the jury must have all the writings which have been properly offered to them.

THE Court charged the jury, that the indorser, being only liable on the default of the maker, the latter ought to be called upon before the former was resorted to, and that the plaintiff having neglected to do so, was not entitled to their verdict.

THE jury could not, however, agree upon a verdict; and one of them was withdrawn by consent. See 1 *Gould's Espinasse*, 96-7-8, *and the cases there cited.*

DESBOIS'S CASE.

MARTIN, *J.* delivered the opinion of the Court. SPRING 1812. I. District.

Jean Baptiste Desbois has applied for a licence to practice, as a counsellor and attorney at law, in the superior courts of this state. By one of the rules of this Court, the application is not to be admitted, unless he be a citizen of the United States. 1 *Martin*, 84.

Inhabitants of the territory of Orleans became citizens of Louisiana, and of the U. States, by the admission of the country as one of the U. States.

HE admits he has no claim to citizenship by birth, nor by naturalization, under the acts of congress to establish an uniform rule of naturalization. 6 *Laws U. S.* 74 & 7 *Laws U. S.* 136; having never complied with the formalities required by any of these laws.

HE contends, however, that natural birth, and a compliance with the formalities of these laws, are not the only modes of acquiring the citizenship of the United States; that the constitution itself has provided a third, viz. the admission into the Union, of a state of which one is a citizen.

BY the 3d section of the 4th article of the constitution of the United States, it is provided that "new states may be admitted by the congress into the union"—and the 2d section of the same article directs that "the citizens of each state shall be entitled *to all the privileges and immunities of citizens in the several states.*" It is impossi-

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ble to give to the provisions of these two sections their effect, in the opinion of the counsel for the motion, without recognising, as a constitutional principle, the position that, on the admission of a new state into the union, its citizens, the members who compose it, become *ipso facto* entitled to all priviledges and immunities of citizens in the several states, consequently to those of citizens of the United States.

IN the confidence that this position will be recognized by the Court, he has built his hopes of success on the establishment of the following facts:

1. That the state of Louisiana was, on the 30th of April last, "declared to be one of the United "States of America, and admitted into the union, "on an equal footing with the original states, in "all respects whatsoever."

2. That at the time, he was a citizen of the state of Louisiana.

To establish his citizenship of the state of Louisiana, he has proved that some time in the year 1806, he removed to, and settled with his family in the city of New Orleans, within the territory of Orleans, in contemplation of the enjoyment of all the advantages, which the laws of the territory, and of the United States, held out to foreigners removing into that territory, which he has ever since considered as his adopted country.

That on the 16th of February, 1811, "the *in-* "*habitants* of all that part of the territory or coun- "try, ceded under the name of Louisiana, by the "treaty made at Paris on the 30th of April, 1803, "between the United States and France, contain- "ed within the following limits" (including the city of New-Orleans) were "authorised to form, "*for themselves*, a constitution or state govern- "ment:" that accordingly, a constitution was formed, and the inhabitants of that part of the former territory of Orleans, which includes the city of New-Orleans, became an independent state, by the name and stile of the state of Louisiana, of which, in his judgment, he is a component member, a citizen.

THERE cannot be any doubt of the correctness of this reasoning, if the word *inhabitants*, used in the part of the act of congress cited, is to be understood *lato sensu*, so as to comprehend every inhabitant, actually settled: but it is contended this word is to be taken in a *restricted sense*, so as to exclude such inhabitants, as were not in the country at the cession.

THE grounds on which it is expected that the latter interpretation will prevail, are:

1. THAT it was only in favour of the persons who inhabited the country, at the time of the cession, that the incorporation into the union, and the

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admission to the rights of citizens of the United States, were stipulated in the treaty. *Art.* 3.

2. THAT the promise, made by congress in 1805, 7. *Laws U. S.* 283, "That as soon as it "shall have been ascertained by an actual census, "or enumeration of the inhabitants of the territo- "ry of Orleans, taken by proper authority, that "the number of free inhabitants, included there- "in, shall amount to 60,000, they shall thereup- "on be authorised to form for themselves a con- "stitution or state government and be admitted "into the union, upon the footing of the original "states in all respects whatsoever," was accompanied with a declaration that the admission should be made "conformably to the provisions of the 3d "article of the treaty." Therefore no person can claim the benefit of this new promise, who could not that of the stipulation in the treaty.

3. THAT the persons, in whose favour the act of congress of the 16th of February, 1811, was made, are described as "the inhabitants of all that "part of the *territory or country ceded, under* "*the name of Louisiana, by the treaty made at* "*Paris, &c.* contained within the following lim- "its;" whilst it would have been far easier to have said: "the inhabitants of all that part of the *terri-* "*tory of Orleans*, contained within the following "limits, &c." if congress had not intended, by a reference to the treaty, the more markedly to point

out those for whose advantage the law was passed, viz. the inhabitants of the territory ceded, at the cession.

4. THIS construction is corroborated by the distinction made by congress in one of their acts. (7 *Laws U. S.* 51.) They there extend the right of owning ships and vessels of the United States, "to the inhabitants of the ceded territory, *who* "*were residents thereof on the 30th of April*, "1803:" clearly excluding those who had arrived since, and were consequently, as it is contended, no part of these inhabitants, in whose favour the stipulation in the treaty was made.

THIS interpretation is resisted on these grounds:

1. THAT the word "the inhabitants of all that "part of the territory or country CEDED," are plain and explicit: and that the Court ought not to permit itself to resort to any rule of construction, when the meaning of the legislator is not expressed in words of a dubious meaning.

2. THAT if the expression was a doubtful one, it would be fairer to look for a clue, in the other parts of the act, than to seek it in other acts, passed several years before, and by other legislatures,—and that it is safer to judge of the legislator's meaning by what he has *done*, than by what he has *said*. Whatever congress may have *said*, as to the persons entitled to be members of the new state,

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they have actually *vested* the right of composing the body, who was to frame the constitution, in some inhabitants who arrived since the cession.

3. THAT to construe the word *inhabitants*, so as to include all *actual* inhabitants, at the time the word was used, is not to construe it *lato sensu*, but to give it its plain and obvious meaning only.

4. THAT if the word be ambiguous, the Court is to look for the meaning of the legislator, in the usage of the country before the passage of the act. Common usage being the best interpreter of the law. *Si enim de ambiguitate legis quæratur, imprimis inspiciendum erit quo jure civitas* RETRO *in ejusmodi casibus uta sit. Stabilia ac optima legum interpres sit consuetudo. Pand. lib.* 1, *tit.* 3, *l.* 37.

5. THAT construction ought, *cæteris paribus*, to preponderate, by which, in the charter of the sovereign, his beneficence shall have the most extention. *Beneficium imperatoris quod a divino scilicet ejus indulgentia profiscicitur quam plenissime interpretare debemus. Did. lib.* 1, *tit.* 4, *l.* 8.

I. IT is true that if the words "the inhabitants "of all that part of the territory or country ceded" stood aloof from others, which may give them another meaning, the Court would not resort to any rule of construction. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda*

est. 2 *Saund.* 157. But to admit that the words are susceptible of that meaning only, in which the counsel for the motion understand it, is to give up the whole question.

II. Surely, the legislator's meaning will be more safely ascertained from a comparison of the different parts of a statute; but it is also proper to consider all other statutes *in pari materia*; and as *actions* denote intentions more forcibly than *words*, what the legislator has *done*, will be better evidence of his will, than what he has *said*.

The doubt which arises as to the meaning of the word *inhabitants*, used in the first part of the first section of the act of 1811, when we compare it with antecedent acts, must be much weakened, when we do so, with what is *said* and *done*, in the second section.

We are to take notice that in the first, the persons who are to constitute the new state are pointed out. The object of the second is, to select from among them those who, on the day of election, are to pronounce the will of the future citizens, in the choice of their representatives. Here we find that inhabitants of the territory ceded, arrived since the cession, even within two years, are authorised to vote. The inference is very strong that, since they are thus called, by an express provision, with those who were in the country at the cession, to

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co-operate in the formation of the constitution, they were intended by congress to have the same rights, at least, as those of the inhabitants at the cession, who for want of certain qualifications were excluded from the poll.

If the inhabitants, who were here at the cession, were the exclusive object of the congress's attention and favour in the *first* section, it is strange that in the *second*, the most important, they should be entirely pretermitted. In pointing out the voters, no right is given to, them as such.

III. IV. Let us now seek the meaning of the word, in the laws and usages of the country before the passage of the act.

The act of congress, authorising the formation of the constitution of this state, 10 *Laws U. S.* 322, was almost litterally copied from that which authorised that of the state of Ohio. 6 *Laws U. S.* 120. In the first section of the latter, "the *inhabitants* of the eastern division of the territory "north west of the river Ohio," are authorised to form, for themselves, a state constitution." In the 4th section, the persons entitled to vote for members of the convention are described—first, all male citizens of the United States—next, all other persons having, &c.

The word *inhabitants*, in the first section of this act, must be taken *lato sensu*, it cannot be

restrained so as to include citizens of the United States only; for other persons are afterwards called upon to vote. There is not any treaty, or other instrument, which may be said to control it. Every attempt to restrict it, must proceed on principles absolutely arbitrary. If the word is to be taken *lato sensu* in the act passed in favour of the people of one territory, is there any reason to say that we are to restrain it, in another act, passed for similar purposes, in favour of the people of another territory?

IT is one of the oldest principles of Anglo-American jurisprudence, that the soil of the United States is that of UNIVERSAL NATURALISATION. An alien in America before the revolution, was entitled to many more rights than an alien in England. 1. By the very act of *migration* to, and settlement in, America, he became *ipso facto* a denizen, under the express stipulations of the colonial charters (all of which, it is believed, contained similar clauses) whereby it was stipulated, for the better encouragement of all who would engage in the settlement of the colonies, that they, and every one of them, that should inhabit the same, should and might have all the priviledges of free denizens or persons natives of England. *Q. Elizabeth's charter to sir W. Raleigh.* 2. By the same act of migration, he had a right to be natura-

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lised under the sanction of a pre-existing law, made not only for the benefit, but for *the encouragement*, of all in a similar situation with himself. The operation of these laws was *immediate* not *remote:* he became a denizen, as of right, instantly; he became naturalised, upon payment of the legal fees for his letters of naturalisation, and taking the oaths. 1 *Tucker's Blackstone, part* 2, *app.* 99.

AFTER the revolution, this principle was engrafted in the constitutions of most of the states. Every foreigner, says the 49th article of that of North Carolina, who comes to settle in this state, having first taken an oath of allegiance to the same, may purchase, and by other lawful means, acquire, hold, and transfer land and other real estate, and after one year's residence, shall be deemed a free citizen.

BY the adoption of the constitution of the United States, the right of aliens to become citizens, was by no means intended to be taken away. On the contrary, it is expressly provided that "congress shall have power to establish *an uniform* "*rule* of naturalisation." *Art.* 1, *sect.* 8. Here we may observe that congress are authorised to prescribe the *mode*, by which aliens are naturalised; but it never was intended to authorise them to take away the *right*. For, among the acts of misrule, alledged against George III. in the declaration

of independence, it is asserted that "he has endeavoured to prevent the population of these states; "for that purpose, obstructing the law for the naturalisation of foreigners, and refusing to pass "others to encourage their migration thither." Every alien, coming to the United States in time of peace, therefore, acquires an inchoate right under the constitution to become a citizen. 1 *Tucker's Blackstone, part* 2, 99, 100.

EVERY European nation possessed of colonial establishments in America, except, perhaps, the Spanish, admitted foreigners to naturalisation in them, without difficulty; and whatever might be the conduct of Spain in her other American colonies, in Louisiana, naturalisation was obtained with great facility. Foreigners were permitted to settle, lands were allotted them, and the expence of their migration was often borne by the crown, who in many instances supplied them with the means of subsistence during the infancy of their establishments. *See Gayoso's instructions and Carondelet's contracts with Bastrop and Maison Rouge. Land laws U. S. appendix* 63, 67, 70. Frequent instances occurred, under the Spanish government, of such naturalised citizens, being appointed to offices of high trust and profit.

IT is, therefore, correct to conclude that foreigners who migrated into the territory of Or-

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leans after the cession, acquired, by the very act of migration, an inchoate right of naturalisation or territorial citizenship, under the particular laws of the land (we mean those by which the country had been regulated under the dominion of Spain, and which remained unrepealed) and the general principles of the American government.

IN 1805, in extending to their newly acquired possession the second grade of territorial government, congress vested new rights in the inhabitants; and as these rights expressly extended to future immigrants, held out new inducements to foreigners disposed to migrate—inducements to which is perhaps due, in a considerable degree, the extraordinary increase of the population of the territory.

THE rights which foreigners acquired before 1805, in migrating into the territory, were that of purchasing and holding land, and consequently establishing themselves thereon.

IT does not appear that they were under any disqualification, express or implied, from holding any office in the territorial government. The contrary is to be presumed; for their eligibility (after a certain period) to seats in the legislative council, had been declared. That body was to be composed of thirteen of the most fit and discreet *persons* of the territory, chosen among those holding

real estate therein, and who shall have resided *one year* at least in said territory. 7 *Laws U. S.* 113.

IN 1805, to those rights were added:

1. That of voting for members of the house of representatives, after a residence of two years.
2. That of being eligible as a representative, after three,
3. And as a member of the legislative council—*Ordinance of* 1787.

THEY were not disqualified from holding any office.

IT is true some real property was required, to exercise those rights; but the same property qualification was indispensable to the inhabitants of the ceded territory residing there at the session.

So that, as to the rights of a territorial citizen, inhabitants arrived since the cession, were *on a perfect equality* with those who were residents at the session.

PERSONS, endowed by the laws of the territory and of the union, with such extensive, such valuable rights, could not be considered on the footing of aliens, in any sense of the word. They had acquired civil rights, of which they could not be wantonly deprived, without a violation of some of the most sacred principles of political justice, as well as of moral obligation. They might emphatically call that country *their own*, in which they

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were permitted to exercise such rights—rights for which some of them had paid a valuable consideration.

THOSE who have served the territory in the legislature, or accepted offices, have, in many instances, forfeited their civil rights and become aliens in the country from which they migrated. *La qualité de Français*, that is to say, French citizenship, shall be lost: 1. By naturalisation acquired in a foreign country: 2. By *the acceptance of public functions*, unauthorised by the emperor, *conferred by a foreign government*: 3. By every establishment in a foreign country, without the intention of returning. *Napoleon Code*, *livre* 1, *chap.* 2, *sect.* 1, *art.* 17.

SURELY, he, who thus engaged in the service of his adopted country, did it in a confidence, which the American government had excited, and consequently was bound not to disappoint wantonly, that its protection should not be withdrawn without cause; that it should not betray him, by sending him back, a stranger in the whole world, liable to be taken and delivered to the very sovereign whose resentment he had excited, by an attempt to throw off his allegiance.

IF an individual, who thus forfeited his rights in his native country, is not, by the late change of government, a citizen of the state of Louisiana, he

is *an alien* TO ALL INTENTS and PURPOSES WHATEVER. When he finds himself thus thrown away, an outcast upon the world, he may well address congress thus: "You have declared me *an* "*alien*. On a war breaking out with my former "country, you will consider me as AN ALIEN "ENEMY. If ever the same laws are enacted as "were passed in 1798 (4 *Laws U. S.* 143) I may "be shipped away. I settled in one of your ter- "ritories, in which your laws offered me a domi- "cil, the right of holding land, elective franchise, eli- "gibility to every office, capacity to exercise legisla- "tive functions: brilliant prerogatives from which "my dazzled mind could not by any possibility "separate the quality of a citizen. I have taken a "wife, children are born to me. These are citi- "zens. Shall I take them with me out of the "only country, in which they have any right, and "wander with them, outcast and forlorn, till I "find an hospitable nation, from whose genero- "sity we may obtain, what we vainly claimed from "your justice. Or shall I part from them and "with the civil rights, of which I am despoiled, "lose those of a husband and a father?

"IT is true I cannot turn to any part of your "statutes in which the citizenship of the United "States was *expressly* promised to me. But

"The obligation of promises, says archdeacon "Paley, depends upon the expectations, which

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"we knowingly and voluntarily excite; conse-
"quently any action or conduct towards another,
"which we are sensible excites expectations in
"him, is as much a promise and creates as strict
"an obligation, as the most express assurances.
"Taking, for instance, a kinsman's child, and
"educating him for the heir of a large fortune, as
"much obliges us to place him in that profession,
"or to leave him such a fortune, as if we had giv-
"en him a promise to do so, *under our hands and*
"*seals. Paley's Ph.* 99, 100.

"Now, if nations are bound by moral obliga-
"tions, receiving a foreigner, allowing him to pur-
"chase land, bestowing on him elective franchise,
"passing laws to authorise him to exercise legis-
"lative functions, that is to say, the sovereign
"power of the country, naturally excite expecta-
"tions, which cannot be wantonly disappointed,
"without a flagrant breach of faith. The expec-
"tation which your conduct excited in me was,
"that I should never be reduced to the condition
"of an alien, without some fault on me."

V. THE Court recognizes the principle that the *act to enable the people of the territory of Orleans to form a constitution, &c.* ought to have a *liberal* construction, and that, without the utmost necessity, no part of it ought to be so interpreted so as to destroy acquired *rights*. In ordinary affairs, the benignity of the law, says lord

Bacon, is such that when, to preserve the principles and grounds of the law, it deprives a man of his remedy, it will rather put him a better degree and condition than in a worse, *nam quod remedio destituitur, ipsa ratione valet*, SI CAUSA ABSIT. *Bacon's Elem. c.* 9. If a man shall not lose his *remedy* without his fault, shall he be presumed to lose his *right*? The presumption, then, must be, that congress, in establishing a government, which necessarily must have deprived certain individuals of their civil rights, would be inclined to give them better—rather raise them to the high situation of a citizen of the United States, than to degrade them to the degree and condition of an alien.

ON the best view of the case, we are of opinion that the reference to the treaty, and the distinction made, in favour of the inhabitants, who were here at the cession, in the sole instance of owning vessels of the United States, are not sufficient circumstances, from which we may imply the intention of congress to exclude from the rights of a citizen of the state of Louisiana, *any person actually and bona fide an inhabitant* of that part of the territory of Orleans, described in the act, at the time of its passage.

THE consequence of this opinion, on the present case, is, that the applicant must be considered as a citizen of the state of Louisiana, and as such

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is entitled to all the rights and priviledges of a citizen of the United States.

Duncan, *Brackenridge*, and *Gales*, for the motion.

Robertson, *Dick*, and *Wilson*, contra.

SAUVE vs. *DAWSON*.

Note to be proved by the report of exports. Appeal bond a good piece of comparison.

Smith, for the plaintiff, offered to prove a promissory note of the defendant, by the introduction of a witness ready to testify to his acquaintance with his hand-writing, and to his belief that the signature at the bottom of the note, was in his hand-writing.

Hennen, for the defendant. This mode of proof is not to be resorted to. The note is denied, and the *Civil Code (p.* 306, *art.* 226*)* provides that "in case the party disavows his signature, proof "of it may be given under oath or affirmation, "by at least one credible witness, declaring positively that he knows the signature, as having "seen the obligation signed by the person from "payment is demanded, and if there be no such "deposition, the signature of the person must be "ascertained by two persons having skill to judge "of hand-writing, appointed by the judge before

"whom the cause is pending, which two persons "shall report on oath, whether the signature ap- "pears to them to be that of the person, whose it "is alledged to be, on their having compared it "with papers acknowledged to have been signed "by him."

Smith, contra. This is a commercial instrument, the proof of which is not to be regulated by the general law. Papers of this kind are very seldom attested by a subscribing witness. The provisions of the *Civil Code* do not controul the established law and usages of commerce, *p.* 470, *art.* 74, and this is the best evidence the nature of the case admits.

By the Court. The part of the *Civil Code* invoked by the plaintiff's counsel, is expressly confined to *claims on the thing sold.* The evidence which we must require, is that which the legislature has pointed out, even when in our opinion, it appears weaker than that which is offered.

WITNESS REJECTED.

Smith then offered the appeal bond, executed by the defendant, as a piece of comparison.

Hennen, contra. It has a subscribing witness, and before it be used, that witness must be bro't to prove it.

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vs.
Dawson.

By the Court. The bond having been filed in the office by the appellant, has become a matter of record, and cannot be denied.

The note was accordingly proven by a comparison with the signature at the bottom of the appeal bond.

PHILIBERT vs. *WOOD.*

Depositions must be returned by the persons receiving them—even when taken by consent.

Smith, for the plaintiff, offered a deposition taken by consent of the defendant's counsel. It was on a loose sheet of paper, and had remained since the taking, in the possession of *Smith*.

Hennen, for the defendant. It cannot be read. The act of 1805, ch. 26, sect. 19, requires that the person taking the deposition of a witness, "shall enclose the same, under his seal, and direct "it to the clerk of the Superior Court." It is his duty to prevent any change or alteration from being made, by enclosing it under his seal, and he should transmit it to the clerk—not deliver it, for keeping, to either of the parties, who may, if the testimony does not suit him, suppress it. The deposition, when taken, belongs to both the parties—neither of them ought to be allowed the facility of depriving the other of it.

Smith, in reply. This act relates only to depo-

sitions taken under it, and by a rule of Court. In the present case, the deposition was taken by the consent of both parties, who therefore impliedly agreed that it should be read, and as they imposed no condition, it must be read absolutely.

By the Court. The party, by consenting that the deposition should be taken, cannot be presumed to have dispensed with any of the formalities required by law, in receiving testimony out of Court.

Deposition rejected.

NUGENT vs. *TREPAGNIER.*

Juror who tried a suit of plaintiff's against another indorser not absolutely incompetent. Objection too late after trial begun.

The defendant was sued as the endorser of a promissory note.

During the trial, *Depeyster*, the defendant's attorney, observed that one of the jurors had tried a suit brought by the plaintiff against another indorser of the note, and prayed he might be discharged; observing that the objection would prevail on a motion for a new trial, and it would save the time of the Court to make it now.

By the Court. It is not clear that the juror is incompetent. Likely, as this case may turn on the same point, as the one which the juror has tried, if the attention of the Court had been drawn

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to this circumstance, they would have been readily induced to dispense with his attendance.

If the witness was incompetent, the Court would discharge him now. In *Kaighn & al.* vs. *Kennedy*, one of the jurors looking at the deposition, recognised on the back of it some figures, which he had made in casting up the interest, on the trial, in the court below, having been a juror there, and *Moore* objected to his trying the cause now, as he had already done so once: On this the cause was continued. *Martin's Notes*, 38.

MOTION OVERRULED.

TONNELIER vs. *MAURIN'S EX'R.*

A person of colour, living with the deceased, and allowing him to receive her negroes' hire without calling him to account, presumed to have allowed the hire as her part of their joint expence.

THE plaintiff lived with the defendant's testator as his *ménagère*. She had with her in his family, several grown daughters of hers. It was in evidence that he hired out some of the plaintiff's slaves, and received their wages. They had lived together in this manner for several years, in Hispaniola, St. Yago de Cuba, and New-Orleans.

By the Court. There being no evidence of the plaintiff having been accounted with, or of any claim of hers in the life time of the testator or of the defendant, it must be presumed that the parties had joined their stock for their mutual support. The plaintiff might as well claim wages for her

services in the house, or might be sued for her board and that of her children.

JUDGMENT FOR DEFENDANT.

Seghers, for the plaintiff.
Cauchois, for the defendant.

SHADDOCK'S CASE.

Witness losing her passage, &c. by being recognised, not entitled to any allowance therefor.

THIS woman claimed the daily allowance of a witness, from the date of her recognizance, on the authority of *M'Fall's Case, ante* 171. It appeared she came from New-York, about nine or ten months ago, for the purpose of collecting some debts due to her. She was part of that time in Florida, returned to New-Orleans, where she kept a boarding-house for two months—afterwards she gave up the house, and engaged her passage on board of a vessel bound to the Havanah. She was deprived of the opportunity of sailing in her, by being recognised to attend this Court as a witness.

By the Court. We went sufficiently far in the case cited, and the principle on which it was determined is not susceptible of extension. The applicant was not deprived, by being bound as a witness, to follow her former mode of obtaining a support. The means through which she had maintained herself during the preceding nine

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months, at the time of the call made on her, were not thereby taken from her. M'Fall was a Kentucky trader, who had come to dispose of a c[illegible] —had he gone home and returned to Court, the milage would have amounted to more than the daily allowance. Havanah, where the present applicant wished to go, was not more her place of residence, indeed much less so, than New-Orleans.

CLAIM DISALLOWED.

Young, for the applicant.

STATE vs. *CECIL.*

Coloured persons presumed free. Collateral & incidental facts, not proven as strictly as facts in issue.

A WOMAN of colour was offered as a witness, by the attorney-general, and a gentleman swore that she was once a slave, but he had liberated her. She had a copy of the act of liberation; the original of which was in New-York.

Wilson, for the prisoner. The Court will not look at the copy, while the original is admitted to exist.

By the Court. The woman being of colour, the presumption is that she was born free. *Adele* vs. *Beauregard*, 1 *Martin* 183. But this presumption is destroyed by the declaration of her former master. This declaration, however, must be taken *in toto*, and it establishes her emancipation

in the same breath. Neither are we ready to say that when, in the trial of a cause, a fact comes incidentally and collaterally to be proved, the rules of evidence are as strictly to be insisted on, as when the facts put in issue are to be made out. In the latter case, the party has previous notice and time to procure the best testimony, which consequently will be required. Not so in the former case, as on a motion for a new trial or for a continuance—when a witness is examined on the *voir dire*.

WITNESS SWORN.

MILNE vs. AMELUNG'S SYNDICS.

By the Court. The petition states that the plaintiff sold to the insolvents two hundred and four bales of cotton. One half of the amount was paid down, and the insolvent's notes received for the other half, payable at sixty days. Before the maturity of the notes, the insolvents failed, and the plaintiff filed his petition, praying for an order of sequestration of the whole cotton, which was granted, and the same was accordingly landed, from a vessel on board of which the insolvents had shipped it.

The prayer of the present petition is, "that "the said cotton may be declared to be the pro- "perty of the petitioner, and delivered to him, or

Vendor, who has received part of his payment, may demand the whole thing sold, on returning it, or that it be sold to raise the balance.

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"so much thereof as may be sufficient to satisfy "the three notes of hand aforesaid."

A VENDOR has a privilege over the thing sold, that is to say, the right of requiring the sale of it, in order to obtain his payment, *Civil Code*, 470, *art.* 14, *sect.* 5, or of demanding the restoration of the thing sold. In the latter case, he is to refund what he has received, and he may prosecute that right, on the whole of the thing sold, even when it is divisible, and he has received part of the payment. *Ord. Bilboa, chap.* 17, *sect.* 40.

THE defendants having interplead and depended on the general issue, it would have been the duty of the Court, on proof of the facts in the petition, to have ordered, as the petition prays, that the whole cotton taken be declared to be the property of the plaintiff; he paying the expences of unlading, and reimbursing the part of the price paid him: but the parties have placed their controversy before the Court, on the following case agreed.

"ON the 16th of February, F. & H. Amelung "purchased of Andrew Milne two hundred and "four bales of cotton, weighing 85,728*lb.* at fif- "teen cents per pound, amounting to the sum of "89,859 20, for which they paid one half in cash "and the other in their three promissory notes, "endorsed by Thomas Elmes. Before the said

"notes became due, Andrew Milne sued out a "special writ of sequestration, by virtue of which "the sheriff seized the whole cotton, on board of "the ship William, then bound to New-York, "consigned to Corp, Ellis, & Sh[illegible]. Afterwards "the cotton, while in the possession of the sheriff, "was bonded for, under a rule of Court, and sold "at twelve cents and one half per pound, at 60 "days, the market price being fifteen cents in "cash; and Andrew Milne presents the annexed "account of charges, on the allowance of which "he is ready to hand over the balance in his hands."

"On the above statement, the following points "are submitted to the consideration of the Court.

"1. Whether Andrew Milne was entitled to "a special writ of sequestration?

"2. If so, whether the debts be entitled to pre-"ference or priviledge?

"3. If so, whether the preference or priviledge "be not confined to one half of the cotton, the "other being paid for?

"4. Whether the costs and charges be not "to be deducted out of the said one half?

"5. Whether the loss, if any, arising on the "sale of the cotton, bonded by Andrew Milne, as "aforesaid, is not to be charged exclusively to "him?

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"6. Whether the charges in the annexed "account be correct?

"*A. L. Duncan*, for plaintiff.

"*A. R. Ellery*, for defendants."

As by the consent of the parties the cotton has been sold, and the specific prayer for a restitution cannot be granted, the case is before the Court, as if the prayer of the petition had been for the vendor's priviledge on the cotton, for the purpose of being paid out of the proceeds.

1. THE Court is of opinion, on the first point made in the case agreed, that the plaintiff was entitled to the speedy writ of sequestration.

2. ON the second, that the debt is such one as gives a preference and priviledge.

3. THAT the priviledge is not confined to a part, but extends to the whole.

4. THAT the charges are not to be deducted, but the plaintiff is entitled to the whole balance of his debt.

5. THAT the difference between the price at the two sales, is to be borne by the defendants, and not by the plaintiff: the action being, by the act of both parties, changed, from an action for the restitution of the thing sold, to an action for the payment of the debt.

6. THAT the charges in the account current not being supported by vouchers, cannot be admitted if denied: but it does not appear necessary

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determine their legality, as the plaintiff is not to be charged therewith.

The plaintiff is, therefore, to be paid the amount of the note with interest, from the day of their maturity; it being posterior to that of the decision.

BRODIE'S HEIRS vs. LYND.

If after execution issued the plaintiffs become alien enemies, the Court will not interfere on a summary application.

Judgement had been obtained and execution issued before intelligence arrived of the declaration of war by the United States against Great Britain. On a suggestion that the plaintiffs were subjects of the king of Great Britain, and are therefore alien enemies,

Livingston, for the defendant, moved that the execution be staid, on the ground that an alien enemy has no right of action whatever during the war. *Wilcox & al.* vs. *Henry*, 1 *Dallas*, 11.

Duncan, contra. The defendant cannot take advantage of this in this way. The court of King's Bench, in *Vanbrynen & al.* vs. *Wilson*, refused to stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. [illegible] *East*, 321. This is a stronger case against relief: for judgment has been given

[illegible]

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and execution issued. *Le Bret* vs. *Lapalle*, 4 *East*, 521, is also a case in point.

MOTION OVERRULED.

ORLEANS NAVIGATION COMPANY vs. *MAYOR &c. OF NEW-ORLEANS.* *Ante* p. 10.

Servitudes are like incorporeal hereditaments and do not pass without a grant.

THIS case was now argued before the three judges.

Moreau for the defendants.

THE defendants have the right to continue to drain the waters of the city through the canal Carondelet, unless the plaintiffs furnish them another drain at their own expense.

1st. BECAUSE they are the owners of the spot on which the canal Carondelet is dug, or have at least the right to enjoy it, as making a part of the commons of the city.

2dly. BECAUSE they are entitled to the use of that service by the situation of the place.

I. THE defendants are owners, or have the use, of the spot of the canal, as making a part of the commons.

THESE existed commons under the French and Spanish government.

SEE the proces verbal d'Olivier Derbigny, the surveyor-general of the province of Louisiana,

made on the 14th of July, 1763, by order of the king of France, to survey the plantation of the Jesuits (now the suburb St. Mary) when the property of the Jesuits was forfeited to the crown—the deliberations of the cabildo—the royal schedule of the king of Spain, dated the 21st December, 1797.

Those documents shew that the defendants had a title to the exclusive use of those commons.

Recognitive acts, when supported by a possession of thirty years, dispense of shewing the primitive title. *Civil Code*, 308, 310, *art.* 237.

The canal Carondelet was included in the commons of the city.

1st. The *procès verbal* of Devezin, says that the commons of the city extended in their depth as far as the bayou St. John.

2dly. The royal schedule of the 21st of December, 1797, says that the three hundred arpens to be rented and divided in small lots, were to be taken out of that part of the commons *which were, during six months of the year, covered with water*, a description which, according to the evidence, could only apply to the low spot where the canal Carondelet is situated.

3dly. The deliberation of the cabildo under the date of the 13th March, 1795, granting three hundred square feet of the commons, to Alex. Baudin, for a certain time and for public utility, says that

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"*the canal Carondelet is situated on the commons* "*of the city.*"

THIS deliberation is signed by the Baron de Carondelet, as president of the cabildo. Let us enquire—in what consisted this right of commons?

WHAT constitutes the right of commons in France? 3 *Encyclopédie de Jurisprudence*, 74, *verbo Communes.*

IN France commons may be held either in ownership or only in use. 3 *Encyclopédie de Jurisprudence 76, verbo Communes.*

WHEN the lords who granted that right, had not divested themselves of their property, they were allowed to take a third part of the commons, for their separate use.

IN the year 1667, the king of France solemnly renounced that right on the commons held under the crown: he rendered an ordinance for that purpose, 3 *Encyclopédie de Jurisprudence, 77, verbo Communes.*

ROYAL ordinances and edicts extended their effect as far as the bounds of the empire, and therefore were in force in the French colonies. *Recueil des Edits et ordonnances royaux par Neron et Girard. Introduction, p.* 1.

UNDER the Spanish government the cabildo made regulations to prevent the usurpations which were made on the commons of the city by several individuals, and to secure to the inhabitants of

New-Orleans, *the right of cutting wood thereon.* *Arrêté of the Cabildo, dated the* 15*th July*, 1796.

THE cabildo granted temporarily some parts of the commons for public utility.

A GRANT was made to Alex. Baudin, of a tract near the canal Carondelet, on the 15th March, 1795. *See translations of documents numb.* 2.

THE cabildo vested sometimes a part of the commons for the benefit of the city.

AN ordinance or *arrêté* was issued on the 5th October, 1792, by the cabildo, on the suggestion of governor Carondelet, by which they ordered to inclose certain parts of the commons, to be granted to the butchers for the benefit of the city.

A GRANT made by the king of Spain himself to one Bermudez, on the 3d May, 1799, which proves that the assent of the cabildo was necessary for such grants, even when they were made for public utility, and that when the condition or the express purpose of the grant was not fulfilled, the cabildo had the right to remove the grantee, and to cause the premises to return to their former nature of commons.

THE king himself, and therefore congress, had not the right to deprive the inhabitants of New-Orleans of the use of their commons, without their consent.

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COMMONS make undoubtedly a part of the things belonging to a community or corporation.

THINGS held in common by a corporation or community, are subject to the same rules as the goods held in common by the whole nation. *Vattel's Law of Nations*, 170, *numb.* 234 *and* 235.

THE sovereign has a right over public and common things, and they make a part of the royal domain, *Vattel*, 174, *numb.* 245 & 246—but he cannot alien or dispose of the public property, and if he alien or dispose of it, the alienation will be invalid. *Vattel*, 178, *numb.* 259 *and* 260.

THE law, 30*th*, *t.* 18, *partida* 3, declares without effect, the grants made by the king to the prejudice of the corporations or communities, unless he manifests a second time his intention to be obeyed.

THE law, 2*d*, *tit.* 5, *book* 7*th*, of the recopilation of Castille, which is posterior to the laws of the *partidas*, declare absolutely null, all grants made by the king, of things belonging to the corporations or communities.

THE rights which the city held under the former governments, were confirmed by the act of incorporation, of the legislative council dated the 17th February, 1803, *sect.* 15, and extended by an act of congress, dated 3d March, 1805, which recognises and confirms the right of the city to

three hundred toises of the commons out and from the fortifications.

THE right of the city to the commons, cannot be affected by the charter of the Navigation Company, which is posterior to the act of incorporation, having been enacted but on the 3d of July, 1805.

THESE rights cannot be affected by the renunciation required by the act of congress, since this renunciation relates only to the land which lies between the basin and the river.

THEY cannot be affected, even impliedly, by the shares which the corporation have taken in the stock of the Navigation Company, since the charter has not vested them with the property of the soil, but only with the right to improve the navigation of the canal.

II. THE defendants are entitled to the service which they exercise on the canal Carondelet by the situation of the place.

SERVICES originate not only from covenant or prescription, but also from the nature of the things. *Civil Code*, 127, *art.* 3. *Domat*, 207, *numb.* 5, *of services, English translation.*

The land situated below, must receive the waters which run naturally from the land above. *Civil Code*, 128, *art.* 4. *Digest, book* 39, *tit.* 3, *law*

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THE proprietor above can do nothing whereby the natural service, due by the land below, may be rendered more burthensome. *Civil Code*, 133, *art.* 4.

BUT the proprietor above may choose or assign the place where his canal is to pass. *Digest*, *book* 43, *tit.* 20, *law* 8. *Traité des Servitudes*, 563.

THE Civil Code is not repugnant to this assignment, since it presupposes it, when it speaks of the right which the owner of the land, subject to the service, has to change the place of it. *Civil Code*, 140, *art.* 64.

IF the primitive place of the service becomes inconvenient, the owner of the land subject to the service, may offer another place equally convenient for the exercise of it, and the owner of the land, to which the service is due, cannot refuse it. *Civil Code*, 140, *art.* 64.

THO' the Navigation Company be not the proprietors of the land adjoining the canal, they cannot be dispensed from furnishing to the defendants another place of drain, if they will not receive the waters of the city through the canal [illegible].

THEY may buy the necessary lands from the neighbouring owners, and if these owners refuse to sell the same, they may compell them to do it, on account of public utility. *Civil Code*, 102, *art.* 2,

which is agreeable to the 7th article of the amendments of the constitution.

The Navigation Company cannot be at liberty to change the place of the service, by offering only another convenient place, but they must furnish another canal of drain at their expence.

1st. Because the canal Carondelet was dug, at least for three fourth parts of the work, by the negroes of the city and its jurisdiction, within 15 miles.

2dly. Because it was dug by the consent of government, under whose title the plaintiffs claim, for the double purpose of navigation and of draining the waters of the city and neighbourhood. See *publications made by order of the Spanish government on the* 26 *May*, 1794, 15 *Sept.* 1795, 19 *Oct.* 1795, & 9 *December*, 1795.

It is immaterial whether it be difficult, or even impossible, to have a canal of navigation, by continuing to drain the waters of the city through the canal Carondelet (though this impossibility has not in any manner been proved); the only enquiry is, whether or not the government intended that this canal should serve for this double purpose, and induced [illegible] by the citizens to lend their negroes for the work.

It is true that in the publication made the 26th May, 1792, it is said that "by the time the canal "Carondelet will be changed into a canal of navi-

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gation," but these words were so little intended to exclude the draining of the waters, that in the publication made the 9th December, 1795, when the canal was nearly completed, so as to be navigable for schooners, the baron repeats that the inhabitants shall have thereby the benefit of draining *their stagnant waters*.

From its natural situation, all the land beyond the city, was liable to receive its water. By the convention which has taken place, every part of the land, except the spot on which the canal is dug, was freed from the natural servitude, which affected the king's property, as well as that of individuals.

If the king had been the owner of all the land between the city and the bayou St. John, a navigable stream, he would have been bound to afford a way, though he might, like an individual, have required compensation; for he is liable to the laws as well as his subjects. 1 *Partida*, *t.* 15 & 16.

The Court has said the servitude is not to be considered as a natural one, because created by the act of man: they have confounded the *right* with the *means* of exercising it. The owner having consented to the exercise of the right on a particular spot, does not alter or change its nature.

The intention of the king, in digging the canal, was, in some degree, to rid the rest of his land

from the natural servitude with which it was burthened. The United States have succeeded to his rights, and transferred them to the plaintiffs, *cum onere*.

HAD the United States sold the land by parcels, the purchasers, might have resisted the return of things to the ancient form: and rightly claimed to hold these lands free from the burthen from which the king of Spain, in whose rights they would stand, had freed them. Is the case different, because one corporation has acquired the whole?

THE Court, in my humble opinion, erred in considering the servitude as created by the act of man. One party cannot raise a dam to stop the water, nor the other any work by which the burthen of the inferior estate may be encreased. *The work of man* does not refer to a *canal* dug, since the owner may do it at his expence.

MATHEWS, J. The canal was made by him by whose authority it was dug; the king of Spain, not the city.

Moreau, continuing. The Court also erred in determining this case on a principle of the common law of England, not applicable to us, in contradiction to the *lex loci*.

MATHEWS, J. It was at least on a principle consonant to reason. The right, having no corporal

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existence, could not be transferred by *delivery*, it must therefore pass by *grant*.

Moreau, continuing. The civil law knows not this distinction between corporal and incorporal rights. *Both* pass by *delivery*. No grant was necessary.

NEITHER was the Court correct in saying the city cannot take advantage of a contract, in which it did not intervene as a party. It does not represent, but has succeeded to the rights of, those by whose aid the king was enabled to dig the canal.

IF the sovereign cannot vest any property or right in a city without a grant, that of New-Orleans may be deprived of every part of its property; for it has no grant. The ground on which this hall stands, that on which the church was built, the jail, the hospital, all have passed without a grant.

MATHEWS, J. No person to accept.

Moreau, continuing. The three hundred toises around the fortifications, were not accepted by the cabildo, yet congress have recognised the right of the city, and confirmed their title.

MATHEWS, J. The sovereign can revoke his gift. The United States have done so, by granting to the present plaintiffs a right incompatible with that claimed by the city. The city cannot

complain, for congress gave it property of much greater value.

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Moreau, continuing. The cabildo represented the city, and draining its streets being an object of public concern, might claim from the king the priviledge of emptying the waters of the city, over the king's land, into the bayou. The city council, having succeeded to that body, may lawfully claim a continuance of a right which the cabildo might insist upon.

THE defendants have a strong claim on the score of equity. The king said his situation, on account of the war, compelled him to set bounds to his munificence. He was unable to dig the canal without the help of the inhabitants of the city. He solicited that. Negroes, cash, were supplied by the wealthy; actual personal labour by the poor. This is surely a valuable consideration.

MATHEWS, *J.* This consideration has been repaid. The use, which the city has had till now, was more than an equivalent.

Moreau, continuing. The consideration a party gives, whatever it may be, entitles him, not to an equivalent, but to every thing that is promised, every thing in the expectation of which the consideration is furnished.

THE Baron de Carondelet, in his last commu-

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nication, acknowledges the proposed advantages were to be *perpetually* enjoyed. "A service of "little moment which, however, will *rid them* "TOTALLY of the stagnating waters, and conse- "quently of the sickness so common in the fall." *Ante* 12.

THE incompatibility of the use of the canal for the purpose of navigation, and that of a drain, does not destroy the contract. For the incompatibility of these two uses, does not exist in regard to *impossibility*, but in regard to *difficulty* and expence.

THE Baron told *Metzinger* "the canal was "dug for the conveyance of the waters of the city, "as well as for the purpose of navigation, and "must answer both the intended objects." *Ante* 13. The Baron intended to increase the canal to double its width, and to have a *marie salope*, to keep it clean. Persons of the art have declared that, with these improvements, the canal might well serve for both the intended purposes. See *Tanesse* and *Castanedo's* testimony. *Ante* 15.

THE impossibility which avoids the obligation of a contract, must be an absolute one. Great difficulty, trouble and expence, do not.

ORIGINALLY the servitude existed over the whole land; by the consent, nay, the act of both parties, and for their mutual interest and convenience, it has been altered. If now the private in-

terest or convenience of either party, requires another change, let the alteration be made at the expence of the party to be benefited thereby.

The counsel for the plaintiffs declined replying.

Cur. adv. vutt.

The Court, a few days after, delivered their opinion:

Mathews, J.† This suit having been twice heard, and determined on its merits, is now again to be decided on a motion for a new trial. Was it not for the great pains and labour, used by the dissenting judge, in giving his opinion or argument in opposition to the decision of the Court, it might be sufficient barely to say, that we can perceive no good grounds for altering our former judgment.

The defendant's counsel, and the learned judge in opposition, having abandoned all pretensions to an absolute title to the disputed property itself, and reduced their whole claim to that of a servitude, this alone we are bound to notice or examine.

It is a little surprising, that one brother judge should seem to turn, with apparent disgust, from any expressions drawn from the common law, to ascertain the character, or name, of the right claim-

† Judge Mathews had the politeness to favour the reporter, with the manuscript from which his opinion is printed.

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ed by the defendants, as the character and name thus deduced, is not only that of the common law, but of common sense, and also of the Roman law, from which he insists on drawing all authority, for the decision of the present cause; and we are surprised that in quoting the Institutes, *lib.* 2, *s.* 3, he did not observe, in the title immediately preceding, and on the same page, *de rebus corporalibus et incorporalibus*, in which it is said, *ss.* 2, *incorporales sunt quæ tangi non possunt, eodemque numero sunt jura prædiorum urbanorum et rusticorum, quæ etiam* SERVITUTES *vocantur.* That a servitude is properly termed an *hereditament*, or that which may be inherited or succeeded to, we believe will not be denied on any hand; and here it may be observed that, in our view, it is very immaterial whether we named things by the common or civil law, if the names are proper according to the rules of common sense and common parlance; and it is quite unnecessary, being the same in both systems of laws, to enquire whether they have been established by the *dictum* of a Roman prætor, the edict of an emperor, or denominated by a learned English law-writer.

THE first position, laid down by the judge dissenting, is, *jus cloacæ mittendæ servitus est*; true, and a very dirty one it is, as it relates to those persons bound to submit to it; and being so burthensome, those claiming such servitude,

ought very clearly to establish their right, before it should be allowed to them.

He next goes on to shew how servitudes are established, and for this purpose cites the Institutes as above stated, wherein it is said "*si quis* "*velit vicino aliquod jus constituere pactionibus* "*atque stipulationibus, id efficere debet;*" also, that a testator may, to the prejudice of his heir, burther his farm with a servitude. The latter clause of this authority, having no bearing whatever on the case before us, we pass in silence. The first sentence comes completely in aid of the opinion of the Court, for we have not been able to discover any pact, or stipulation, by which the defendants have established their right to the servitude claimed: still believing that, to all contracts, agreements and stipulations, two parties are necessary in some shape or other.

It is said and insisted on, "that permission and "forbearance establish servitudes," and in support of this position, is cited the digest, *b.* 8, *s.* 3, where it is stated *traditio plane et patientia servitutum inducet officium praetoris;* and here it might be observed, that the judge is a little unfortunate, after having thrown aside the common law, as affording no legitimate aid to the determination of this cause, to have fallen on a sentence in the Roman law, which it is almost impossible to understand, except by the assistance of a commen-

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tator, who has been obliged to give it a totally new structure, in order to make it intelligible; and says that it ought to be thus read, *patientia plane, ut traditione, servitutem inducet officium prætoris*; which, we suppose, may be thus construed, "by "long and open forbearance, *as by being trans-* "*mitted from one to another*, it is the duty of the "prætor to consider it a servitude;" this right must partake of the nature of prescription, and to end all discussion on this point, it is sufficient to observe that, against the sovereign, prescription cannot run.

WITHOUT determining on the correctness or incorrectness of the judge's second proposition, in which he states that "a right may vest in a person, "natural or corporate, without any covenant or "agreement of such a person," it will suffice to shew, that the authorities brought in support of it are not applicable to the present cause. To effect a proper application of the citation from *Pothier* to this suit, it is necessary to shew that the Baron Carondelet had a right to burthen the royal domain with servitude, or to alter and modify those which existed by nature. It is not contended that he had such a power, arising from his office as governor, nor does it appear that he had any special authority to convey, or give in any manner, the right now claimed by the city; such a power can only be dubiously implied from one of the

official papers laid before the Court, which states that "the expences of the war, precluding the "hope that the royal treasury would contribute "to the expence of a considerable canal of navi- "gation, government had only solicited the king "to allow the convicts (that were about to be "transported to Pensacola) to remain in New- "Orleans, engaging with their aid, and that of "several inhabitants zealous for the *public* good, "to dig *a canal for draining*, which will be "changed in successive years into a canal of navi- "gation for schooners."

It seems to us, from this paper, that the intention of the governor, and his master the king, had been to make a *considerable canal* of navigation; but the deficiency in the public funds, rendering it impossible at that time to execute so expensive a project, they were content that the city of New-Orleans might aid in making, for the present, a canal for draining—permitting them to use it for that purpose, until it should be convenient to render it fit for the first great end intended—*a canal of navigation*. Now if the Baron had no right to give, grant or sell a servitude, the doctrine of the "*actio utilis*" cannot be made to touch the present cause, for the donor having no power to give, the donation itself fails, and every correlative must fall with it, and the party for whose benefit it was intended, can claim nothing by the

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gift. But admit that the governor had a right to give, grant, or stipulate relative to servitudes on the public domain, is there stronger evidence that he stipulated with those individuals who gave the service of the negroes, that the canal should forever remain a sewer for the city, than that it should be made a canal of navigation? If we recollect the testimony correctly, it appears to have been intended more for the latter purpose than for the former; indeed it appears, that the primary object and ultimate end of all concerned in it, was to make it a canal of navigation. We are of opinion that it cannot answer the two-fold use of a common sewer to the city, and of a navigable canal; and that the community must lose all the advantages which might be derived from its navigation, or the city must desist from using it as has been heretofore done, and as there is no contract or stipulation, vesting in the corporation the right which they claim, they have no legal pretensions to the servitude as arising from grant or contract.

BUT it is said they have a right *ex natura loci*, because the canal is on land lower than that on which the city stands, and that by the civil law the lower ground owes a natural servitude to the higher, to receive its waters, and that the judgment of the Court is erroneous in requiring evidence of a grant of this right, which arises from the nature of the place. It is true that the owner of the lower

ground is bound to receive the water running from that of the superior landholder; but it must be received as it flows by the course of nature, and cannot be altered or modified except by compact or agreement betwixt the parties interested, and it would be proper to require the same power to change and modify a right, as to grant it originally. It is equally true that we have it in evidence, that all the lands immediately behind the city are lower, and naturally receive the water of it; they receive it as an inclined plane, each space receiving the water immediately descending on it, there stagnating, and not flowing in any particular stream or direction, except in very high water; and it is said, that because *quacunque servitus Fundo debitur, omnibus ejus partibus debitur*, therefore, the owner of the inferior land cannot free any part of it from the servitude. True, the canal must bear its proportion of the natural servitude, and we suppose that the plaintiffs would never have complained, were it not for the attempt to make them submit to the whole drainings of the city from one end to the other, whereas by nature they are only bound to receive such portion of the water as would occupy an extent on the upper ground, equal to the width of the canal on the lower.

We are not able to feel the force of the objection made by the dissenting judge, to favouring

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the pretensions of the plaintiffs, because they are mere donees or volunteers. The donee certainly succeeds to all the rights of the donor, as well as to the burdens on the thing given. Suppose the United States still held their right to the canal, and granted to the city, as they have done all the balance of the land in its rear to the distance of 600 yards, with what just or equitable pretensions could the defendants insist on the exercise of a servitude on the part retained, which was only due by the whole commons, and that to the utter destruction of the part retained, for the purposes intended by its retention, or with what face could they demand of the general government to give them another canal, when they have granted to them the very land through which it must pass? and to the value of perhaps more than ten times the cost of the canal: and as the plaintiffs have succeeded to all the rights and privileges of the United States, they are not bound by law, or in equity and good faith, to do more than the government would have been obliged to perform had they retained the canal. The servitude claimed being a natural one, due by the whole extent of land in the rear of the city, must be apportioned according to the extent of the grant to the plaintiffs and defendants, as it is said in the digest, book the 8th, tit. law 25th—"*Si partem fundi mei certam tibi vendidero, aquæductus jus etiamsi al-*

terius partis causa plerumque ducatur te quoque sequetur: neque ibi aut benignitatis agri, aut usus ejus aquæ ratio habenda est: ita, ut cum solam partem fundi, quæ pretiosissima sit, aut maxime usum ejus aquæ desideret, jus ejus ducendæ sequatur: sed pro modo agri detenti, aut alienati, fiat ejus aquæ divisio. This is when the aqueduct is beneficial, and if a benefit is to be divided, by analogy, so ought a burthen.

The defendants ought to take nothing by the motion.

LEWIS, *J.* concurred.

MOTION OVERRULED.

THE opinion of the Court, was delivered immediately after its opening, and before MARTIN, *J.* took his seat. He had prepared the following:

UNABLE to concur with my brothers, in some of the points on which the judgment of the Court is founded, and particularly a principal one, upon which one of them has insisted, during the last argument, *ante*, 223 & 224, I have again given to this case all the attention of which I am capable, and I have to lament my utter inability to recognise some of the principles upon which it has been determined.

I ADMIT that, according to a well known rule of the common law of England, the right which

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the defendants claim, "having no corporal exis-
"tence, could not pass by *delivery*, it must there-
"fore pass by *grant*." Neither am I willing to contest whether this rule be *grounded on reason?* But I have said the common law of England was not the rule of conduct which the parties recognised. On the contrary, the rule of the civil law, the law of the land, in this respect, differs *toto cælo* from that which it has pleased the Court to establish.

Res incorporales, says Bracton, TRADITIONEM *non patiuntur*, *l.* 2, *c.* 18.

TRADITIO *servitutum*, says the Digest, *inducet officium prætoris. l.* 8, *tit.* 3, *l.* 1, *s.* 2.

IN the institutes incorporeal things are defined: those which cannot be touched. *Incorporales autem sunt que tangi non possunt*, l. 2, *tit.* 2, *s.* 1, and a note is introduced in the margin, by Gothefred, whether they are susceptible of *delivery? An* TRADI *possunt?* For the solution we are referred to the digest. Here the query is answered in the negative. *Incorporales res* TRADITIONEM *non recipere manifestum est. l.* 46, *tit.* 1, *l.* 43, *s.* 1. But, adds the commentator, they are susceptible of a FICTITIOUS *delivery. Nisi fictam scil. alias mero jure*, but are considered as *delivered* when we are permitted to enjoy them. TRADITÆ *censentur cum alius patitur nos iis uti.* We are referred to the 6th book of the digest. It

is there said that if a servitude be delivered the right of the person thus acquiring it, shall be protected. *Si de usufructo agatur* TRADITO, *publiciana actio datur, itemque* SERVITUTIBUS *urbanorum prædiorum, per* TRADITIONEM *constitutis, vel per patientiam. Forte si per domum quis suam passus est acquæductum traduci: item, rusticorum prædiorum: nam et hic* TRADITIONEM *et patientiam tuendam constat.* L. 11, s. 1.

The annotator adds that incorporal things are susceptible of a *quasi-delivery. Proprie, scil,* QUASI-TRADITIONEM *recipiunt.*

AFTER this, it is difficult to misunderstand, or find any ambiguity or obscurity in the position that servitudes pass *by delivery.* TRADITIO *plane et patientia servitutum inducet officium prætoris. Dig. lib.* 8, *tit.* 3, *l.* 1, *s.* 2. *Delivery* certainly, and forbearance of servitudes, give rise to the interference of the prætor. Neither is the note less plain. *Aut ita legendum est, ut* TRADITIONE *servitutum inducet officium prætoris. Neque interea displicet quod a Baldo traditur, servitutes tradi patiendo seu patientia: deberi officio judicis.*

FROM these different texts, I have inferred that a servitude, although an incorporal thing, may pass by *delivery*, according to the principles of the civil law. Though not susceptible of a corporal *delivery*, or *delivery* DE FACTO, it is sus-

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ceptible of a *delivery* DE JURE, and will therefore pass *without a grant*. For example: If I purchase a right of view over my neighbour's estate, and he does actually pull down, for the purpose, as much of his wall, or of his house, as before obstructed my windows, the act of pulling down will be a *delivery* of the right of view. TRADITIO *quæ inducat officium prætoris*. If I demolish myself the part of the wall or house, in consequence of an agreement between him and me, his forbearance will perhaps be an equal evidence of my right. PATIENTIA *quæ inducat officium prætoris*.

THE French law writers recognise this principle of the civil law. "A third manner of acquiring property" says Pothier, "is *delivery*, by "which the property of a thing, passes from one "person to another. Doctors call it, *modus acquirendi dominia derivativus*. This manner of "acquiring property is derived from natural law." *Traité de la propriété*, 192, *n.* 193.

Hæ quoque res, quæ TRADITIONE *nostræ fiunt, jure gentium nobis acquiruntur. Nihil enim est tam conveniens naturali æquitate, quam voluntatem domini rem suam in alium transferre ratam haberi. l.* 9, *s.* 3, *ff. de acq. rer. dom.*

"Incorporeal things," continues Pothier, "not "being susceptible of possession, since possession consists in the corporeal detention of a thing,

"It follows as a consequence, that they are not "more susceptible of delivery: delivery being "only a transfer of the possession. Yet, as for "want of a possession, strictly speaking, we re-"cognise a quasi possession of incorporeal things, "which consists in the use which is made of them, "there ought to be also a kind of *delivery* of in-"corporeal things."

"Thus delivery, with regard to real rights, "of the rights of servitude, is done *patientia et "usu*, that is to say, when he, in the sight of "whom the right is used, suffers it to be used. "For example: If I bound myself to give you a "right of way over my land, I am holden to make "you a *delivery* of it, when you begin to pass "over it and I suffer it. If I bound myself to "give you a right of view over my house, when "you will make windows and the mean wall, and "I suffer it." *Traité de la proprieté*, 208, *n.* 214.

We must be careful not to confound two different means of acquiring property, *delivery* and *prescription*.

The former is derived, as we have seen, *jure gentium*, the other from the municipal law. *Delivery* is a means of acquiring property by the act of the owner. Prescription, is a means of acquiring it, without any act of his, even without his consent or knowledge.

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"Lastly," says the author just cited, "we "lose, without our consent, and even our knowledge, the property of a thing, belonging to us, "when he who possesses it, acquires it by *prescription*. As soon as the possessor has, by "himself or those from whom he holds, accomplished the time required to allow the prescription, the law, which establishes prescription, deprives us, *ipso facto*, of the property we had in "the thing, and transfers it to the possessor." *Traité de la propriété*, 272, *n.* 276.

In order that the *delivery* may vest the property, it is necessary it should be made by a person having power to alien it. Now the land, on which the canal was dug, if the plaintiffs have any right on it, was, at the time the canal was dug, the property of the king, vacant, unappropriated land, *terras realinguas*. The power of the governors of Louisiana, to grant the king of Spain's vacant land, is not at this time to be doubted. Few of the planters have any other title to their land, but what proceeds mediately or immediately from a governor's grant or concession. If he could alien the soil, surely he could burthen it with a servitude. *Omne majus includit in se minus*. In this particular instance, the governor acted with his master's knowledge and consent. Before the canal was begun, the king consents that the galley slaves be employed to dig it: after it is completed,

he directs that it may be used in draining the lands around the city.

THINKING that the right, which the defendants claim, might pass to them *without a grant*, I must conclude with their counsel, that there was no necessity for a formal, literal acceptance. If it be admitted that the right was acquired *traditione* or *patientia & usu*, it must follow that it was accepted, although there be no *written* evidence of the acceptance.

I CANNOT assent to the position of one of my brothers, *ante*, 224, 225, that as a sovereign can revoke his gift, the United States may have done so, that is, destroyed the title of the defendants, by granting to the present plaintiffs a right incompatible with that claimed by the city: not that the city cannot complain, for congress gave it property of much greater value.

FIRST. It is very doubtful whether, after the United States have made an absolute donation, they can recall it. But the right claimed by the city, if it exist at all, was acquired for a valuable consideration; labour and money spent in digging the canal.

SECONDLY. The congress has not *given* a foot of land to the city. The confirmation of "the "claim of the corporation to the *commons* adja-

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"cent to the city, within six hundred yards of the "fortifications of the same," was not gratuitous, but made, in consideration of their relinquishing their claim to the rest of the said commons, and of their conveying part of the land within the six hundred yards, to the present plaintiffs. 8 *Laws U. S.* 304.

IN the opinion I delivered last term, *ante* 32, I stated the grounds on which I think that the city might claim a right, accruing under the agreement or convention between the Baron de Carondelet and some of its inhabitants, although the city was not a party thereto.

I CONCLUDE that the principles, upon which the judgment of the Court rests, appearing to me untenable, I think it ought to be reconsidered.

ELLERY vs. *AMELUNG's SYNDICS.*

Attorney's bill not privi-ledged.

SUIT for services as an attorney and counsellor at law. The plaintiff was on the insolvent's *bilan*, as a creditor of five hundred dollars for professional services. The jury allowed him that sum, and he claimed to receive it as a priviledged debt. *Civil Code*, 468, *art.* 72, *s.* 2.

By the Court. He is only to be collocated on the *tableau* for that sum. The code allows a pri-

viledge in favour of *law charges, frais de justice.* The English expression is rather vague—the French one is only, costs of court : taxed costs.

A CREDITOR who claims to be paid, in exclusion of the others, must make out his right strictly. Priviledges are odious and should be restrained.

PRIVILEDGE DENIED.

Mazureau, for the plaintiff. *Moreau*, for the defendants.

SIMPSON vs. *BURNETT.*

The disability of the pl'f. can only be taken advantage of at the trial of the cause.

THE defendant had been held to bail upon the usual affidavit.

A RULE was obtained to shew cause, why the order to hold to bail, should not be dissolved, upon the ground, that the defendant was an inhabitant of the territory, residing out of the first superior court district.

Ellery, in support of the rule. By the "*Act "supplementary to an act, providing for the su-"perior court going district,*" every suit begun against any residing landholder, shall originate before the judge of the parish in which said landholder resides. 1807, *ch.* 1, *sect.* 11. And with respect to all causes which are to be transferred to

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the circuit courts, it is made the duty of the superior court to order, that such of those causes as shall yet be pending before it, when this act shall begin to be in force, shall be transferred to the respective circuit courts of the circuit wherein the defendants reside. 31*st sect.* Every defendant, therefore, must be sued in the parish, or district, wherein he resides; and no process from this court can legally issue against the present defendant, who is a landholder, residing in the parish of Greenville, in the second superior court district. If this suit had been pending in this court, at the time of passing the above act, it would have been the duty of the court to have transferred it to the second district, and this, it would appear, summarily, whenever the residence of the party defendant in that district, was made to appear; and not by a plea in abatement, which would have placed it on the trial list, there to wait its turn, and subject the parties to great expence and loss of time. Neither does it appear that in any cause thus pending when this act went into operation, the defendant was ever compelled to resort to this plea. The present defendant being in a similar situation, is entitled to a similar remedy; the date of the suit ought not exclude him from the benefit of it.

By the Court. This objection is premature. The disability of the plaintiff can only be taken

advantage of by a plea in abatement, or at the trial of the cause.

RULE DISCHARGED.

KERSHAW vs. *COLLINS.*

Clerk's certificate that there is a judgment, is no evidence of it.

THE plaintiff had judgment against the defendant, in the county of the Attakapas, and now brought a suit in this court on it. The defendant pleaded *nul tiel record.* On the trial, a certificate of the clerk of the court in which the judgment was had, was produced, attesting that such a judgment was rendered. He transmitted a certified copy of the execution which had issued, returned *nulla bona.*

By the Court. The clerk cannot certify a judgment, in any other manner than by giving a copy of it. From the execution, which is properly shewn, the fact that a judgment was rendered, cannot be inferred.

JUDGMENT FOR DEFENDANT.

Caune, for plaintiff. *Porter*, for defendant.

WELMAN, CURATOR, &c. vs. *CONNOLY.*

THE defendant had been held to bail upon the usual affidavit, for a debt due to the estate, in

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which the necessary oath had been made by the plaintiff, as curator.

Disability of the plaintiff, not a fact to be tried upon a motion to discharge bail, but must be pleaded in abatement.

UPON a motion to shew cause why the bail should not be discharged,

Ellery and *Livingston*, for defendant, offered to prove that the letters of curatorship granted to the plaintiff by the court of probates, had been revoked, in consequence of his having neglected to provide a surety to replace the one originally furnished, who had become insolvent; and that the plaintiff, being thus deprived of the capacity in which only he had a right to sue the defendant, the order to hold to bail should be dissolved, as illegally obtained. That, by the act regulating the practice of the superior court in civil causes, every defendant arrested and held to bail, may be discharged by proving, to the satisfaction of the judge, that the facts stated by the petitioner, in order to hold the defendant to bail, are not true. 1805, *ch.* 26, *sec.* 12.

BUT, *by the Court*—This is not one of those facts contemplated by the act, to be liable to be disproved in this summary way. An intended departure from the territory, the possession by the defendant of sufficient property, if attached, to satisfy the judgment, which the petitioner expects to obtain in the suit, &c. may fairly be put at issue upon a motion to discharge the bail. But the dis-

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ability of the plaintiff to prosecute his suit, can only be made to appear on the trial of the cause, in a plea of abatement. Otherwise causes of this description might be tried upon collateral issues, and instead of taking the usual course on the trial list, would obtain an undue preference, and this to the exclusion of the jury.

MOTION DENIED.

WREKS vs. *TRASK.*

If the plaintiff reside in the territory, tho' out of the district, in which the suit is bro't, the court will not stay proceedings, till he give security for the costs.

THE defendant had been held to bail upon the usual affidavit.

A RULE was now obtained to shew cause, why the proceedings in this cause should not be stayed, until the plaintiff, who resided out of the first superior court district, should give security for the costs, in case a verdict was rendered against him, or he was nonsuited.

Ellery, in support of the rule. This case would admit of no doubt, if the plaintiff resided out of the territory. In the courts of Common Pleas, and of King's Bench, in England, whenever the plaintiff is shewn to reside abroad, this order is always granted. 1 *T. Rep.* 267. 1 *East Rep.* 431. 2 *Hen. Black.* 384. 2 *Vesey*, 471. The reason of it is evident, inasmuch as the plaintiff would

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not be within reach of the court, so as to have process served upon him for the costs. The same reason applies to the present plaintiff, who though an inhabitant of this territory, resides out of the district where the suit was instituted. By the act supplementary to an act, entitled, *an act providing for the superior court going circuit*, 1807, c. 1, this territory is divided into five superior court districts, where the courts are respectively to be held; and these courts, though composed of the same judges, cannot be considered the same courts. Each has its separate clerk, and sheriff, to make out, certify and serve its processes. There is no intercommunity of jurisdiction. No process from one court can issue, except certified by its own clerk; or be executed, except by its own sheriff. In the present case, for instance, should the plaintiff fail in his suit, can a *fi fa*, for the costs, be executed by the sheriff, out of this district? Would it not be necessary to commence a new suit, and obtain process in the district where the plaintiff resides? In an English court, a plaintiff in Ireland is considered so far abroad, as to oblige him to give security for costs, and for the reason here urged; because the process of the court would not reach him, in case an execution issued for the costs. 1 *T. Rep.* 362, *Fitzgerald* vs. *Whitmore*. And if the process of the court will not reach a plaintiff, residing in a different district,

ought we not to be entitled to the benefit of the same rule?

Hennen, contra. The application of the defendant is founded on a rule of the court, requiring non-residents of the state, to give security for costs. This rule cannot be extended to residents of the state, though residing out of the district. "It was held by the court of King's Bench in a "variety of cases, and those of no very ancient "date, that a plaintiff's residence abroad, or in "Scotland, was not a sufficient ground for staying "the proceedings in the suit, 'till security was "given for the costs, because such a practice "was said, might operate as a discouragement of "trade and commerce, would be clogging the "course of justice, and in a great measure pre-"clude foreigners from suing in our courts, as in "a strange country they might, frequently, be "unable to find security." 2 *Str.* 1206. 1 *Wils.* 266. 2 *Wils.* 1026, 4 *Burr.* 2105. *Cowp.* 158. *Hullock's law of costs*, 442.

Of late years this rule has been changed, as is proved by the authority in 1 *T. R.* 267 & 491. Nor is it an uniform rule of the court of Common Pleas. 1 *H. B.* 196. The practice of the court of Exchequer has always been uniform: no precedent, of such security having been required, is to be found in that court, *Anstr.* 359, *Beckman*

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vs. *Legrange*. 7 *Bac. Abrid.* 122. The rule itself, then, of requiring security for costs, is founded, I think, on questionable grounds; but to extend it so far as to say, that inhabitants of the same state should be bound to conform to it, would be highly oppressive to the poor, and a great hindrance to justice: a planter, for instance, in the city of New-Orleans, from Washita, might find it difficult to obtain security for costs, in a suit which he might wish to bring against an inhabitant of the city. It would also be extending the rule beyond the spirit of the English decisions—a judgment against the plaintiff for costs, would always be a matter of record, on which the defendant might obtain an order of seizure from the court of the parish, or the superior court of the district, in which the plaintiff might reside.

Ellery, in reply. There is no doubt but in England, both in the courts of King's Bench and of Common Pleas, that security for costs was not always required, when the plaintiff was a foreigner or resided abroad; but, of late years, the practice in that respect, in both courts, has been changed; and now, not only foreigners and plaintiffs residing abroad, in both courts are obliged to furnish this security, but in the court of King's Bench, this rule has been extended to a plaintiff residing in Ireland, who was *quoad hoc* considered as a fo-

foigner. When this was so decided, in the case of *Fitzgerald* vs. *Whitmore*, it was then, as now urged, that such an extension of the rule was impolitic; but the court decided that the same reason which induced it to lay down the rule with respect to foreigners, namely, that the process of the court could not reach them, in case an execution issued for costs, held equally with respect to Irishmen. And this same answer can now be given to the same objection, raised in the present case; that a plaintiff residing out of the district, is *quoad hoc* a foreigner, whom the process of this court cannot reach. And if the rules and decisions of the courts in England are resorted to, should we not rather be influenced by their latest decisions and improved rules, than by obsolete cases and exploded practice?

The argument *ab inconvenienti* has not much force. In the case supposed, the Washita planter must have very little confidence in the goodness of his cause, or be very much limited in his funds or credit, if he should find a serious difficulty either to deposit the requisite sum, or furnish the necessary security for the payments of costs, should they be cast in the suit. On the other hand, the defendant, in this event, would be put to serious inconvenience in their recovery. He has, indeed, the remedy pointed out, though a circuitous one, that of an order of seizure; but this implies

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a new suit to be instituted by him in the district where the plaintiff resides. But is not this, in effect, making two suits out of one, and before different tribunals? Again, where the act directs that defendants shall only be sued in the district where they reside, was it not intended that the whole suit should be there decided? Was it supposed, that a branch of it was to extend to the district of the plaintiff, and to be carried before the tribunal in that quarter? Certainly, much less inconvenience will result from the adoption, than the rejection of this rule.

By the Court, LEWIS, *J.* alone. The security which the court requires of foreign plaintiffs, is the *cautio judicatum solvi* of the civil law, which is required from *foreigners* only. The principles cited by the defendant's counsel, are not recognised in the United States. In them, like in this, there are a number of courts, limited in their jurisdiction to a small extent of country; and it could not be endured that every plaintiff suing out of his parish or district, should have his suit stopped, till he came and gave security for the costs.

RULE DISCHARGED.

STATE vs. PIERCE.

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Examination of prisoner on oath, rejected.

HORSE-STEALING. The attorney-general offered as evidence the examination of the prisoner, taken by the mayor. It appeared to have been subscribed and *sworn to* by the prisoner.

Henken for the defendants. It cannot be read. The examination of the person accused ought not to be upon oath. *Hale's P. C.* 304. The confessions of a person taken upon oath, cannot be read in evidence against him. Of course, no prisoner, brought before a magistrate, ought to be sworn. The reasons of this restriction result from the most obvious principles of justice, policy, and humanity. *M'Nally's P. C.* 47. The examination of the prisoner shall be without oath. *Buller's N. P.* 242. 2 *Bacon's Abr.* 664.

OUR act of assembly, 1805, *c.* 8, *sec.* 1, requires the magistrate to take the *voluntary declarations* of such persons so accused.

EXAMINATION REJECTED.

STATE vs. RODRIGUEZ.

Viva voce testimony of prisoner's examination, rejected.

HORSE-STEALING. The attorney-general offered *viva voce* evidence of what the prisoner had said, when brought before the magistrate previous to his commitment, relying on 2 *Hawk. P. C.*

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304. It did not appear whether the magistrate had committed the declarations of the prisoner to writing.

Rodriguez, for the prisoner. The testimony cannot be received. The confession of the defendant himself, in discourse with private persons, or before a magistrate, *if not taken in writing*, has always been received against him. *M'Nally's P. C.* 40. Hence, it follows, that if it be taken in writing, it cannot be received: and the proof that it was not, lies on the attorney-general.

THE rule of law is the compass by which the court is to be guided. What a prisoner says, in other places, may undoubtedly be received upon *viva voce* testimony; but as the law requires that his examination before the magistrate, should be reduced to writing and returned to the court, the particulars of such examination cannot be given in evidence *viva voce*, unless it be clearly proved that in fact such examination never was reduced to writing. *Jacob's case*, 1 *Leach*, 349.

IN *Hinkman's case*, *id. in notis*, the prisoner had made a confession before a justice of the peace, but his examination was not returned, and it was uncertain whether it had been reduced to writing. It was objected on the authority of *Jacob's* case, that parol evidence could not be given of any thing which had been disclosed by the pri-

sooner before the magistrate: for that it would be permitting his negligence and breach of duty to operate to the prejudice of the prisoner; as a witness, by selecting only part of what was said, or using different words, might give a different colour to the fact. The court refused the oral testimony.

In *Fisher's* case, *idem*, there being no evidence that the examination was not reduced to writing, *viva voce* testimony of it was rejected. *Bacon* goes farther, for he states absolutely, that if the confession be not reduced to writing, it cannot be used against the accused. 2 *Bacon's Abridg.* 604.

By the Court. It is very clear that we cannot admit the witness, and that the case stated by the attorney-general must be taken as a general rule, to which those produced by the prisoner's counsel form an exception. The superior court of North-Carolina, in the case of *the state* vs. *Grave*, *Martin's Notes*, 43, refused to receive the testimony of the committing magistrate, who had neglected to reduce to writing the declaration of the prisoner before him; neither would they consent that he should write it down in court.

In this state, the case differs very much from a similar one in England. Our statute, 1805, *ch.* 8, requires the magistrate to take the declarations of the prisoner in writing, *and cause them to be sub-*

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scribed by the declarant, in his presence. It does not put so much confidence in the magistrate, as to allow him to state the prisoner's declarations, in such a manner as to render the statement legal and authentic, without the prisoner's concurrence. His signature is essentially requisite: without it, the examination must be rejected. It may well be doubted whether, while the law so carefully provides for the safety of the accused, against the great facility with which words may be misrepresented, and his declaration coloured, whether the decision in the case of the *State* vs. *Grove* is not much more consonant to the strict principles of justice, than any of those which have been read. If it were to be adopted, the magistrates would be less remiss in their duty. However, this point is not now to be decided. There is no proof that the magistrate did not comply with the act of assembly, and the presumption is that he did. The testimony offered must therefore be rejected.

NELSON & AL. vs. MORGAN.

Agent disobeying orders, not liable for the whole value of the thing, but only for the injury sustained.

THE plaintiffs, at New-York, had consigned to the defendant, at New-Orleans, seven pipes of Madeira wine, to be sold at a limited price, but the defendant, after keeping them a long time upon hand, without being able to procure this price, reshipped them, without other directions, to the

plaintiffs, at New-York, who received them, under protest, and wrote him, that they had abandoned them, and held them merely as his property and subject to his orders. They were, however, afterwards sold by them, at auction, at New-York, though at a price inferior to that at which they had limited their sale at New-Orleans, and the proceeds of the sale retained in their hands; of which fact, they gave no information to the defendant. The object of the suit, was to recover damages for the deviation from the plaintiffs' order.

Livingston, for the plaintiffs. The measure of damages ought to be the amount of the whole subject. Look at the facts in this case; this parcel of wine was sent here, for the purpose of being sold at a limited price, and the proceeds remitted to the plaintiffs at New-York; and no proof is exhibited to shew that the original instructions of the defendant had been countermanded, or his discretion, as an agent, enlarged. However well intended or meritorious, then, may have been his motives in the reshipment, it was, notwithstanding, a departure from his instructions, and he has thereby rendered himself liable in damages to his principals. And, though a degree of discretion is necessarily vested in a factor or agent, yet this step far transcended its limits; and it never could seriously have been made a question, whether an agent thus

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situated, had not made himself answerable for so palpable a violation of his orders. The only question now is, how far he has become thus liable, and what is to be the rule by which the damages are to be measured. This will depend upon the nature and extent of the breach of instructions on the part of the agent. If the act proved upon him, has been only a partial violation of them, and but part of the subject affected by such violation, he is to answer only partially in damages, and not to be mulcted beyond the amount so affected; but if, on the contrary, the violation be such as to affect the whole subject, he is answerable in damages for the whole amount. In the present case, the breach of instructions was not a partial, but a general one; it extended to the whole subject; it involved the whole consignment; of course, then, we look to its whole value as the measure of damages, viz: the value of the wines at the price at which the defendant was authorised to sell them. Indeed, no other criterion of damages can well be found, or safely be acted upon; and this has been adopted, I think, invariably. It has been fully and recently recognised, in the celebrated case of *Le Guen* vs. *Governeur & Kemble*, 1 *John. Rep.* 466. You will also see the same principles laid down in the case of *Walker* vs. *Smith*, 4 *Dallas*, 390. and in *Bay's Rep.* 169. It will probably be

objected, that this parcel of wine was afterwards received by the plaintiffs at New-York, and by them sold; and that, in this manner, they are attempting to be paid for it twice over. But it must be recollected, in what manner it was received by them, and for whom sold. It was received under a protest, which they lost no time in communicating to the defendant, at the same time formally abandoning the wine; the defendant, by the reshipment, made it his own; and if the plaintiffs now hold the wine, or, if sold, the proceeds of sale, it is as his agents and subject to his orders. They have no further interest in it; to them it has been totally lost; and if any hardship be supposed to exist in this case, it is one of the defendant's own making, and he must submit to the inconveniences he himself has produced.

Ellery, for the defendant. There are many cases, in which an agent or factor must necessarily exercise a discretion, though his duty be *generally* to follow the instructions of his principal; this discretion, in the present case, has been fairly assumed and impartially exercised; the defendant, in the reshipment of the wines, has pursued the interest of his principal at his own expence: to the loss of storage, had the wines remained upon hand; and of commissions, could they have been sold in this city. And I think, if an opportunity

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be given, it will be shewn he did not exceed the limits of a sound discretion—that he rather acted *without* orders, than *against* orders; and rather anticipated the instructions he expected to receive, than violated those he had received. But supposing, on his side, such a departure from his instructions, as to subject him to an action of damages, has not the jury been in an error, in relation to the rule by which they have been measured? and are the plaintiffs entitled to a verdict, as they claim, for the whole amount of these wines, although they have afterwards been received back and sold by the plaintiffs, and the proceeds put in their pockets? There are cases, undoubtedly, where the whole amount of the article may constitute the criterion of damages; but can it fairly be resorted to upon this occasion, and under the present circumstances? In the cases relied upon by the counsel of the plaintiffs, the breach of instructions not only extended to the whole subject, but involved in it the loss of the whole property. In the case of *Le Guen* vs. *Governeur and Kemble*, the defendants assumed an absolute control over the property, and converted it completely to their own use; the only compensation, then, commensurate with the damage actually sustained by the plaintiff, was the amount of the whole subject thus completely lost him. The

same will apply to the other cases cited, where the loss was a total one, or the whole property put completely out of the reach and possession of the plaintiffs. But in our case, the whole subject was preserved entire and safely placed in the hands of the plaintiffs; the wines, though at first received by them under protest, and with a threat of abandonment, were afterwards by them sold in their own names and upon their own account; and, although three years have since nearly elapsed, it does not appear that the defendant was even apprised of this sale, or was ever furnished with any account, or credited for the proceeds. Can they now conscientiously demand the full price of the wines *here*, after having sold and received the full price of them *there*? Are they entitled to the benefits of two markets, and a double sale? If, on the reshipment, the wines had perished, then might the gentleman's rule apply with more force; and with more propriety might he urge that, by this act, we had made them our own, and that we had reshipped them at our own risk, and had become the insurers; but after their safe arrival, reception, and sale, the rule and the objection come too late. As well might the insured come upon the underwriter for a total loss, after the safe arrival of the insured property. But, it is further said the plaintiffs had a right to abandon, and by thus rendering it a total loss, make the breach of in-

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structions extend to the whole subject. Suppose they actually possessed this right, and had even taken the proper steps to secure the exercise of it, have they not retraced them, and by their subsequent conduct completely waved it? By whose instructions, and in whose name, and upon whose account, I again ask, were those wines sold at New-York? Who has disposed of the proceeds, and benefited by the sale? Not the defendant, who has but recently and accidentally come to the knowledge of this fact; but the plaintiffs, who concealed, or at least never communicated it; and the utmost the defendant can be liable for, is the difference of price, and the expences of reshipment. Supposing these wines had sold at a superior price at New-York, according to the reasoning relied upon, the agent would be liable in damages for the profits secured to his constituent.

By the Court. The measure of damages, in this case, ought to be the value of the wine, at the highest market price in this city, at any time till the beginning of the suit, adding thereto the freight to New-York, and deducting therefrom the value of the wine at New-York, when the plaintiffs received it.

Damages are always to be measured by the degree of injury which the party sustained, except in some cases when the defendant has been guilty

of gross fraud or misconduct; then vindictive damages are sometimes given by the jury. In this case, no ill intention can be imputed to the defendant: it is therefore enough, if the plaintiffs be made whole; they are not to be enriched at the expence of the defendant, *neminem oportet alterius damno locupletari.* The value which the plaintiffs put on their goods, is not to be recognised by the jury, unless evidence of its correctness be administered to them. The correct value cannot be more than the highest price, in the market, which the plaintiffs had selected, as the best for the sale of his goods. It is clear that if any individual, by any improper act of his, unmixed with fraud, had occasioned the destruction of the wines, we should have directed the jury to value them at the market price.

VERDICT ACCORDINGLY.

TAYLOR & HOOD vs. *MORGAN.*

Alien enemy not heard, on a motion to dissolve an injunction.

THE defendants had obtained a judgment, and execution had issued against the goods of the defendant, who procured an injunction. The plaintiffs now moved to have it dissolved. The dissolution of it was refused, on the ground that, since the injunction had been obtained, the plaintiffs, who resided in Great Britain, had become *alien enemies* by the late declaration of war between the

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United States and the king of Great Britain. The court declined dissolving the injunction.

Depeyster for the plaintiffs. *Duncan* for the defendants.

ELMES's vs. *ESTEVA's SYNDICS.*

Priviledge on *taxed costs*, only.

Some property of the defendants had been sold at the instance of the plaintiffs, and the money ordered to be at the order of the court; it was now ordered to be paid over, and the syndics claimed to retain part of it, for expences in law proceedings; and the court, referring to their decision in *Ellery* vs. *Amelung's syndics*, *ante* 244, said a priviledge could be allowed on *taxed costs* only.

Prevost for plaintiffs. *Depeyster* for defendants.

M'MASTER & AL. vs. *DUNCAN & AL.*

Practice on the return of an award.

By the Court. On an award being brought in, the course of practice is, to give notice to the adverse party to shew cause why judgment should not be entered according to the award.

Livingston for plaintiffs. *Duncan* for defendants.

NUGENT vs. *MAZANGE*.

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If the place of payment be altered, parties taking the note after the alteration, are bound by it, and *as to them* the demand is well made at the new place.

THE defendant was sued as the plaintiff's immediate endorser, on a note drawn by Delhomme, and dated "German Coast," in favour of Trepagnier, who endorsed the same to H. Dukeilus, a merchant of the city of New-Orleans. Dukeilus, by a memorandum at the bottom of the note, made it payable at his domicil in New-Orleans, and then endorsed it over to the defendant: this memorandum was made without the knowledge or consent of the maker, or payee, of the note. The German Coast, the domicil of the maker of the note, Delhomme, is about thirty miles above the city. The note was placed in the Louisiana Bank for collection, and, when due, was presented at the domicil of Dukeilus in the city, and protested there for want of payment: notice of the protest was left in the city, at the mother-in-law's of the defendant, who resided a few miles out of the city; where the notary had heretofore left notices of protest, which he had always received. The drawer of the note was a planter in good circumstances, and able to pay the amount of the note. The case was submitted to a jury, who found a verdict for the plaintiff. On a motion for a new trial,

Porter, for the defendant. There is no regular protest, nor due notice, to charge the defen-

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dant, and there is a material alteration in the note, which annuls it.

THE holder of a note is bound to make a demand of payment at the domicil of the maker, or at the place of payment pointed out by the note itself. *Swift*, 254. The note in question was dated "German Coast," the domicil of the maker; and as the place of payment was afterwards altered without his consent, a protest at the domicil of Dukcilus cannot charge the defendant. The analogy between a bill of exchange and a promissory note, begins when the latter is endorsed, and then the rule is exactly the same upon promissory notes as it is upon bills of exchange—consequently, the same strictness in protesting and giving notice, is requisite. 2 *Burr.* 676-7. Before an endorser can be charged, a demand must be made on the acceptor of the bill, and in case of a promissory note, on the maker. No demand has been made on the maker of the note in this case; for a demand at a place not pointed out by him, cannot be considered as such. The defendant as endorser, therefore, cannot be liable, as legal diligence in obtaining payment of the maker, has not been used—moreover, the notice of the protest, by being left at the house of a relation in the city, is not sufficient: it should have been sent by the first post. But this alteration in the place of payment, so material in this action, must be considered as destroy-

ing the validity of the note, even in the hands of an innocent holder. *M'Master* vs. *Miller*, 4 *T. Rep.* 320.

Hennen, contra. This alteration in the note may be considered as discharging the payee and first indorser, without whose consent or knowledge it was made; but all the parties to the note, who took it after Dukeilus had made it payable at his domicil, must be bound by such alteration, their consent in it being implied; a protest, therefore, at the domicil of Dukeilus, was the only one which could possibly charge the defendant, who took the note and passed it off, thus altered. *Swift*, 266. *Selwyn's N. P.* 335, *Gould's Esp. N. P.* 1*st part*, 76, 77, with the cases there stated. The question of our diligence, in giving notice of the protest, has been submitted to the jury, and their verdict should be considered as conclusive. 1 *Dall.* 252, 2 *Dall.* 158, 2 *Hayw.* 302, 333. But as the endorser can receive no damage from want of notice, the maker of the note being in solvent circumstances, the laches of the plaintiff cannot avail the defendant. In actions by endorsers against endorsers, on promissory notes, where there have been laches as to notice, evidence has been repeatedly admitted, to shew that the endorsers had received no injury, and that the circumstances of the maker of the notes were not altered

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since the notes became due. *Story's Chitty*, 162-3.

By the Court. The defendant having passed the note to the plaintiff, after the alteration in the place of payment was made, cannot take advantage of this alteration. It may affect the note as to the maker, and the endorsers through whose hands it passed before it was altered; but endorsers, who received and passed it away after, cannot complain.

WHETHER there was a regular notice, in other words, whether the one given was left at the proper place, was a matter of evidence, properly to be determined by the jury.

NEW TRIAL DENIED.